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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 347.

MINNESOTA STATE LIBRARY

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THOMAS P. CLARK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 29, 1914.

(24,037)

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No. 2259

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

THOMAS P. CLARK,

Defendant in Error.

VOLUME I.
(Pages 1 to 304, Inclusive.)

Upon Writ of Error to the United States District Court of the District of Arizona.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

[1*] *In the District Court of the Fifth Judicial District of the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All Cases Arising Under the Constitution and Laws of the United States as is Vested in the Circuit and District Courts of the United States.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff above named complains of defendant and alleges:

I.

Plaintiff is a resident and citizen of the town of Clifton, Greenlee County, Arizona Territory, and has been such resident and citizen for 12 years last past.

That defendant, during the time herein mentioned has been, and yet is, a railroad corporation duly and legally incorporated under the laws of the Territory of Arizona and doing business as such in said Territory under its corporate name, "The Arizona and New Mexico Railway Company," and that it is domiciled at, and has, and maintains its general office, where all its records are kept, [2] in the town of Clifton, in Greenlee County, Territory of Arizona, and that it is an inhabitant and citizen of said town

*Page-number appearing at top of page of original certified Record.

of Clifton, in said Greenlee County, and is an inhabitant of said Fifth Judicial District of the Territory of Arizona, in which judicial district is situated said town of Clifton, and Greenlee County.

That the defendant is now, and was, on the day hereinafter mentioned engaged in the business of running and operating a railroad from said town of Clifton, to Hachita, Territory of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and during the time herein mentioned was, and yet is, a common carrier of freight *of* passengers for hire, and during such time has owned, and yet owns, and operates said line of railway which extends from the town of Clifton, Territory of Arizona, southerly through the Territory of Arizona, to Hachita, in the Territory of New Mexico, and as such common carrier operates freight and passenger trains for hire in and through the said territories of New Mexico and Arizona, on said line of railroad, between said points and was during the time and places herein mentioned engaged in interstate commerce on, over and through said line of railroad, and employed a large number of brakemen, and other employees, whose business it was to run and operate [3] said trains for hire, and were at the times and places herein mentioned employees of defendants and as such servants were engaged in interstate commerce on said railroad.

That on and prior to March 15th, 1911, plaintiff was employed by defendant as a locomotive engineer on said railroad, actively engaged in said interstate commerce, in the service and employ of defendant

for hire, and as such locomotive engineer had charge of and was running a switch engine for defendant, in the railroad yards of defendant, at the town of Clifton, on said railroad, which said engine at the time of the injury herein complained of, was owned by defendant, and actively engaged in interstate commerce for defendant and that plaintiff while in the actual discharge of his duties and employed in said interstate commerce, for defendant, was injured through the negligence and carelessness of defendant.

That defendant, at said town of Clifton, during the time herein mentioned, maintained and has a large number of tracks, turnouts, and switches for the storage of cars and for the making up of freight trains thereon and the same being the railway yards of defendants and are comprised within the said railroad of defendant and the same being used by defendant on its railroad in said interstate commerce; that said tracks, turnouts, and switches extend from the railroad depot of defendant at said town of Clifton, [4] southerly through said town of Clifton, a distance of about one-quarter mile, down to and past The Shannon Copper Company's store, to the railway bridge of defendant, which bridge crosses the San Francisco River at that point; that at about 800 feet north of said railroad bridge, on said railroad, there is a switch which leads off from the main track of said railroad and which said switch runs in a southerly direction, a distance of about one-half mile, to the smelter of the Shannon Copper Company, which said switch line of railroad running to said smelter, during the time herein mentioned, was

and yet is, owned, used and managed, by defendant, and for and during said time, was and yet is, a part of defendant's said line of railroad; that on the 15th day of March, 1911, there were in said railway yards at said Clifton, twelve foreign freight-cars, owned by Atchison, Topeka & Santa Fe Railway Company, C. & S. Ry. and of other railway companies, but of what other companies plaintiff does not know, which said 12 freight-cars were loaded with coke and merchandise and which said 12 freight-cars had been brought from some point beyond the Territory of Arizona, in and over defendant's said line of railroad to said town of Clifton and the same were consigned to said Shannon Copper Company; plaintiff says that on or about March 15th, 1911, [5] he was ordered and directed by defendant and its duly authorized agents to cause said 12 foreign freight-cars to be removed from defendant's said yards, and the same taken over said switch to said Shannon Copper Company's smelter, and that in the removal of said freight-cars there were assisting the plaintiff, John T. Kelly, who was yardmaster for defendant, J. M. Kline, who was foreman for defendant, and T. J. St. Thomas, and Jesse Murphy, who were brakemen for defendant, all of which persons, including the plaintiff, were the crew of helpers and were employees, agents and servants of defendant in said railway service; that the line of said railroad switch, running to said Shannon Copper Company's smelter is over a steep grade, and was so much of an uphill that said switch engine could not take more than four of said freight-cars at any one trip up to said

smelter; and must move rapidly in order to pass the grade; that four of said cars has been taken up to said smelter and that the other eight thereof were on the main line of defendant's said railroad, just north of said railroad bridge, and four of which said cars had just been switched back south from said Shannon switch to a point of about 400 feet north of said railroad bridge, on defendant's said railroad and at the time when plaintiff was in the act of removing the other four of said freight-cars past the frog, and was passing out and over said Shannon switch, his engine being in motion, when the said four freight-cars, which had just been switched south to [6] said point and about 400 feet north of said railroad bridge, came running down northerly on said railroad track, a distance of about 200 feet, and the same ran against and struck the tender of the engine-cab, in which plaintiff was then and there sitting with great force and violence, thereby throwing plaintiff with great force and violence to the deck of said engine-cab, and violently partly throwing plaintiff out of said engine-cab and injuring the socket of his left hip, injuring his back and spine, and destroying the sight of his left eye; that that portion of said railroad, extending from said railroad bridge, to said Shannon switch, a distance of about 800 feet, is on an incline grade, sloping to the north, the incline thereof being to such an extent that cars placed thereon without being set to brakes or chocked would not remain, but would run from said bridge northerly to and pass said Shannon switch; that when said four freight-cars

had been switched to and brought to said point of about 400 feet north of said railroad bridge, on said railroad, it then and there became, and was, the duty of said brakemen and duty of said foreman J. M. Kline, who was then and there brakeman in charge of said freight-cars, to set the brakes on said freight-cars and chock the same so that they would not run north on said railroad, the said distance of about 200 feet to the point where plaintiff was moving the other four of said freight-cars; that while plaintiff was in the exercise of due care for his own personal safety, without negligence or fault on his part, and having [7] no warning, nor notice, nor knowledge, was struck by said freight-cars, which had been switched to and left at said point, or about 400 feet north of said railroad bridge, as aforesaid, and without any fault or contributory negligence on his part.

Plaintiff says that when said four freight-cars had been switched to and left at said point of about 400 feet north of said railroad bridge, that it then and there became, and was the duty of said J. M. Kline, said brakeman and other said brakemen to cause the brakes to be set on said freight-cars and the same securely chocked and fastened so that they would not leave the place whereon they had been switched to and placed, as aforesaid, and would not run north, down said track, to the point where plaintiff was switching and removing the other four of said freight-cars, but, on the contrary, said brakemen and said J. M. Kline, brakeman in charge, neglected to perform their duty in that regard, and neglected to set the brakes on any of the said cars which had

been switched to said point or about 400 feet north of said railroad bridge, as aforesaid, which it was their duty to do, and that he neglected to chock said cars, and neglected to secure said cars in any other way so that the same would not run north, as aforesaid and that on account of the carelessness and negligence of said J. M. Kline, and the other brakemen and employees to set said brakes and their negligence to chock said cars, or in any way to [8] secure the same, and that in consequence of their said carelessness and negligence, said cars ran north on said track, collided with and struck the cab of the engine in which plaintiff was sitting, and thereby caused said injury and damage to plaintiff, that defendant and its said agents and servants were negligent and careless in permitting and allowing said four freight-cars to escape and run north, as aforesaid, and violated their duty in that regard.

Plaintiff further says that if said defendant and its said servants and agents had set the brakes on said four cars, or had caused the same to be chocked, as it was their duty to do, that the same would not have run north on said railroad, and would not have struck the engine-cab in which plaintiff was sitting, and that plaintiff would not have received said injuries; that defendant, its servants and agents well knew that said freight-cars would not remain on said track at said point without the brakes having been set or said cars chocked, and very well knew at the time that said cars would not stay on said track at said point without the brakes being *without the brakes being* securely set or the same well chocked; that de-

fendant, its agents and servants, violated their duty and were negligent and careless in failing to set said brakes or chock said cars so as to prevent the same from running north and colliding with the switch engine which plaintiff was in charge of and operating, and that defendant and its said agents and [9] servants were careless and negligent in permitting said cars to so escape, run north and collide, as aforesaid, and were careless and negligent in allowing and permitting said cars to collide, as aforesaid; and plaintiff further says that before, and at the said time when said cars ran north and collided with said switch engine, as aforesaid, defendant and its said agents and servants then and there very well knew that said cars without having the brakes thereon set and chocked would run away, and that plaintiff, or some other employee, would be killed or seriously injured by such collision, or by the exercise of ordinary care and inspection the defendant and its agents and servants could have known all of the above-stated facts; and that if defendant and its said agents had exercised due care, as it was then and there their duty so to do, said four freight-cars would not have escaped and run north and collided with the cab of said engine in which the plaintiff was then and there sitting, as aforesaid, and plaintiff would not have been injured and damaged as herein stated; but, on the contrary, plaintiff avers the fact to be, that on account of the failure of the defendant and its said agents and servants to perform their said duty, and on account of their negligence and carelessness in allowing and permit-

ting said freight-cars to escape and run north, as aforesaid, and in particular, the said carelessness and negligence of said J. M. Kline, the brakeman in charge of said freight-cars [10] to perform his duty, and his negligence in permitting said cars to collide with said engine, plaintiff was injured, and damaged, as aforesaid.

Plaintiff further says, that on March 15, 1911, at the time of said accident and injury, two of defendant's said servants, John T. Kelly and Jesse Murphy, had left their places of duty, were away and not attending to their duties in and about the moving of said cars, and that on account of their absence there was short and insufficient crew to perform said work and in this connection, plaintiff charges the fact to be, that it was negligence and carelessness on part of defendant and its servants to do or to attempt to perform said work by an insufficient number of servants, and that it was violation of the duties of said servants to remain away from and fail to perform their duties, and negligence and carelessness on the part of said servants to be absent from their post of duty, and which negligence and careless conduct of said absent servants aided in causing and bringing said accident and injury to plaintiff.

Plaintiff says that it was not his duty to set the brakes on said cars, nor to see that the same were chocked, or in any way secured, or fastened, and the plaintiff was ignorant of the fact that the brakes had not been set on said four cars, and was ignorant of the fact that the same had not been chocked so as to prevent their moving or colliding with said en-

gine until too late to avoid said accident, [11] and that on account of the obstruction of plaintiff's view by covered cars, and the noise of the engine and cars, he was unable to see said four cars when the same were running toward the engine which he was operating and that on account of said noise he was unable to hear the said approaching cars and could not discover that said four freight-cars were approaching said switch engine by the exercise of ordinary care.

Plaintiff further says that each of the aforesaid negligent and careless acts and omissions on the part of said defendant, said J. M. Kline, and defendant's said agents and servants, was the direct and proximate cause of said accident, and plaintiff's consequent injuries, for which defendant is liable, and that said injuries consisted of bruises and cuts, internal injury of the chest and lungs, injury to his back and spine, serious shock and jar, four broken ribs, left hip greatly injured and by reason of said shock, jar and injury plaintiff has completely lost the sight of his left eye.

Plaintiff says that the cars he was moving and the cars which collided with said engine were in use, and had been in common and regular use, upon the lines of the said road of defendant, engaged in moving and transporting interstate commerce and traffic, and that said cars were at the time of said accident, being used in connection with other cars of the defendant in switching, making up and distribution of interstate commerce traffic over defendant's [12] said line of railroad.

That before the time that the said accident occurred both eyes of the plaintiff were strong and healthy, and his vision was clear and distinct, and that he was able to see perfectly; that on account of said accident, plaintiff has suffered great pain and still suffers, and will suffer great pain, as the result of the injuries complained about; that plaintiff after said injuries, placed himself under the care of a skilled oculist, aurist, and surgeon with the hope and purpose of saving his sight, if possible, and also of having his wounds about his body, eyes, back and spine properly and safely cared for and cured, but under the most careful skill and treatment the sight could not be restored to his left eye, his said broken ribs have not and will not heal, nor get well, and the same press against his lungs and give him pain, and as the result of said shock and jar, he has spinal and nervous affec*ta*tions.

That plaintiff while undergoing treatment for said injuries and up to said present time, has been totally unfit and unable to engage in any work, and by his enforced idleness for a period of nine months has lost about $1,575.00 in wages; and his physical condition is such at present that it may be many months and years before he will be able to make a living for himself, if ever. That since said accident, and on account thereof, plaintiff has been obliged to be under medical treatment and at an expense of $300.00, and [13] has been out for medical care and attention the further sum of $800.00 and is still under the care of a physician; that plaintiff is a locomotive engineer by trade, and at the time of his injury was 65 years

of age, in good bodily health and condition, and never before had any sickness; that at the time of his injury he was earning, and was physically able to earn, the sum of $165.00 for 28 days' work as a locomotive engineer, which salary the defendant was paying plaintiff at the date of said injury for this service as said locomotive engineer.

Plaintiff further represents and shows to the Court that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as the "Federal Employer's Liability Act," which said act is now in full force and effect in the Territory of Arizona and Territory of New Mexico, and was at the time and place of the happening of said accident, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for recovery herein, both as to the liability of the defendant as a common carrier in the Territory of Arizona, as well as to the rule of evidence governing such actions, and the measure of damage which said act, on which plaintiff relies for recovery herein, as well as the fact that plaintiff and defendant are both residents and citizens of the said Fifth Judicial District of the Territory of Arizona.

[14] Plaintiff says that the defendant company, by its said acts, deeds, negligence and carelessness of its officers, servants and agents, has wrongfully deprived the plaintiff of his means of support, and that in addition to said expenditures of money for medical treatment, loss of time, loss of wages, physical and mental pain, he has suffered damage by reason of the destruction and loss of the sight of his

left eye, four broken ribs, bruised hip-joint, injured back and spine, bodily disfigurement, and on account thereof, he has suffered damages to the amount of forty thousand dollars ($40,000).

WHEREFORE, plaintiff demands judgment against defendant for $1,575.00, loss of wages, $1,100.00 expenditure on account of said medical treatment, and said $40,000, aggregating the sum of $42,675.00, for which sum and amount, plaintiff demands judgment against said defendant, together with the costs and disbursements of this action.

L. KEARNEY,
Attorney for Plaintiff.

[Endorsements]: (1.) No. 14. No. 29–A. In the District Court of the Fifth Judicial District of the Territory of Arizona, Having and Exercising the Same Jurisdiction in all Cases Arising Under the Constitution and the Laws of the United States as is Vested in the Circuit and District Courts of the United States. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Complaint. Filed at 9:30 A. M. January 18th, 1912. George H. Smalley, Clerk. L. Kearney, Clifton, Arizona, Attorney for Plaintiff.

[15] UNITED STATES OF AMERICA.

In the District Court of the Fifth Judicial District, of the Territory of Arizona.

(Having and Exercising the Same Jurisdiction Under the Constitution and Laws of the United States as is Vested in the District and Circuit Courts of the United States.)

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Summons.

Action brought in the District Court of the Fifth Judicial District, Territory of Arizona.

The United States of America, Territory of Arizona, Sends Greeting to The Arizona and New Mexico Railway Company, a Corporation.

You are hereby summoned and required to appear in an action brought against you by the above named plaintiff in the District Court of the Fifth Judicial District of the [16] Territory of Arizona, and answer the complaint filed with the Clerk of this Court at Globe in said District (a copy of which complaint accompanies this summons) within twenty days (exclusive of the day of service) after the service upon you of this summons, if served in this county; but if served out of the county and within this District, then within thirty days; in all other cases forty days.

And you are hereby notified that if you fail to appear and answer the complaint as above required, the plaintiff will apply to the Court for the relief therein demanded; and costs and disbursements in this behalf expended.

Given under my hand and the seal of said District Court, at Globe, this 18th day of January, 1912.

GEORGE H. SMALLEY,
Clerk.

By ————————,
Deputy Clerk.

[United States District Court, Fifth District, Arizona—Seal]

[17] UNITED STATES MARSHAL'S RETURN.

Office of the United States Marshal,
For the Territory of Arizona,—ss.

I hereby certify that I received the within summons on the 1st day of February, A. D. 1912, and personally served the same on the 1st day of February, A. D. 1912, on defendant named in said summons, the within named corporation, The Arizona and New Mexico Railway Company, by then and there delivering to A. T. Thompson, agent of said The Arizona and New Mexico Railway Company, by delivering it, and leaving with said A. T. Thompson personally, in the County of Greenlee, Arizona Territory, a copy of said summons, together with a true and correct copy of the complaint in this ac-

tion, and personally leaving same with said agent A. T. Thompson.

C. A. OVERLOCK,
Marshal.
By G. A. Tracey,
Deputy Marshal.

Fees $3.00.

[Endorsements]: (3.) No. 14. United States of America District Court, District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Co., a Corp., Defendant. Summons. Filed March 23, 1912. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy Clerk.

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[18] *The District Court of the Fifth Judicial District of the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All Cases Arising Under the Constitution and Laws of the United States as is Vested in the Circuit and District Courts of the United States.

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Answer.

Comes now the Arizona and New Mexico Railway Company defendant in the above-entitled cause and for answer to complaint of plaintiff herein filed, de-

murs thereto and for grounds assigns the following:

I.

Because said complaint does not state facts sufficient to constitute a cause of action.

II.

For further answer defendant denies each and every allegation in said complaint contained. Having fully answered asks to be discharged with costs.

McFARLAND & HAMPTON,
Attorneys for Defendant.

[19] [Endorsements]: (2.) No. 14. 29–A. Thomas P. Clark, Plaintiff, vs. The Arizona & New Mexico Ry. Co. Answer. Filed Feb. 14, 1912. 9 A. M. Geo. H. Smalley, Clerk.

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[20] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Amended Complaint.

Plaintiff in this his amended complaint complains of the defendant, and alleges:

I.

Plaintiff is a resident and citizen of the town of Clifton, Greenlee County, State (formerly Territory) of Arizona, and has been such resident and

citizen for 12 years last past.

That defendant during the time herein mentioned has been, and yet is, a railroad corporation duly incorporated under the laws of the Territory (now State) of Arizona and doing business as such in said Territory (now State) under its corporate name, "The Arizona and New Mexico Railway Company," and that it is domiciled at, and has, and maintains its general office, where all its records are kept, in the town of Clifton, in Greenlee County, Territory (now [21] State) of Arizona, and that it is an inhabitant and citizen of said town of Clifton, in said Greenlee County, and is an inhabitant of said District Court of the United States for the District of Arizona, in which judicial district is situated said town of Clifton and said Greenlee County.

That defendant is now, and was, on the day hereinafter mentioned, engaged in the business of running and operating a railroad from said town of Clifton, to Hachita, Territory (now State) of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and during the time herein mentioned was, and yet is, a common carrier of freight and passengers for hire, and during such time has owned, and yet owns, and operates said line of railway which extends from said town of Clifton, southerly through the Territory (now State) of Arizona, to Hachita, in the Territory (now State) of New Mexico, and as such common carrier operates freight and passenger trains for hire in, on, over and through said line of railroad, between said points, and was during the times and

places herein mentioned engaged in interstate commerce on, over and through said line of railroad, and employed a large number of brakemen, and other employees, whose business it was to run and operate said trains for hire, and were at the times and places herein mentioned employees of defendant and as such servants were engaged in interstate commerce on [22] said railroad for the defendant.

That on, and prior to March 15th, 1911, plaintiff was employed by defendant as a locomotive engineer on said railroad, actively engaged in said interstate commerce, in the service and employ of defendant for hire, and as such locomotive engineer had charge of and was running a switch engine for defendant, in the railroad yards of defendant, at said town of Clifton, on said railroad, which said engine at the time of the injury herein complained of, was owned by defendant and the same was actively engaged in said interstate commerce for defendant on its said railroad, and that plaintiff while in the actual discharge of his duties, and employed in said interstate commerce for defendant, was injured through the negligence of defendant and the carelessness of defendant's agents and servants as hereinafter set out.

That defendant, at said town of Clifton, during the time herein mentioned, maintained, and has a large number of tracks, turnouts, and switches for the storage of cars and for the making up of freight trains thereon, and the same being the railway yards of defendant and are comprised within the said railroad of defendant and the same being used by de-

fendant on its said railroad in said interstate commerce.

That said tracks, turnouts, and switches extend from the railroad depot of defendant on its said railroad at said [23] town of Clifton, southerly through said town of Clifton, a distance of about one-quarter mile, down to, and past the Shannon Copper Company's store, to the railway bridge of defendant on its said railroad, which bridge crosses the San Francisco River at that point; that at a point of about 800 feet north of said railroad bridge, on said railroad, there is a switch connecting a spur line of railroad which leads off from the main track of defendant's said railroad and which runs in a southerly direction from said switch, a distance of about one-half mile, to the smelter of the Shannon Copper Company, which said spur line of railroad during the time herein mentioned was the property of said Shannon Copper Company, but that said spur line of railroad during the time herein mentioned was in the use and management of defendant, as a part of defendant's said line of railroad.

That on the 15th day of March, 1911, there were in said railroad yards at said Clifton, twelve foreign freight-cars, owned by Atchison, Topeka & Santa Fe Railway Company, C. & S. Ry., and of other companies, but of what other companies plaintiff does not know, which said 12 freight-cars were loaded with coke and merchandise, and which said 12 freight-cars had been brought from some point beyond the Territory (now State) of Arizona, in and over defendant's said line of railroad to said town of Clif-

ton, and the same [24] were consigned to said Shannon Copper Company.

Plaintiff further says that on or about March 15th, 1911, he was ordered and directed by defendant and its duly authorized agents to cause said 12 foreign freight-cars to be removed from defendant's said yards, and the same taken over said switch spur line of railroad to said Shannon Copper Company's smelter, and that in the removal of said 12 freight-cars there were assisting plaintiff the following named persons: John T. Kelly, yardmaster; J. M. Kline, foreman; T. J. St. Thomas and Jesse Murphy, brakemen—all of which said persons, including plaintiff, were the crew of helpers and were then and there employees, agents and servants of defendant, for hire, in said railway service; that the line of said spur railroad from said switch, running to said Shannon Copper Company's smelter is over a steep grade, and so much uphill that said switch engine could not take more than four of said freight-cars at any one trip to said smelter, and must move rapidly in order to pass said grade; that four of said cars had been taken up to said smelter and that the other eight thereof were on the main line of defendant's said railroad, just north of said railroad bridge, and four of which said cars had just been switched back south from said Shannon switch to a point of about 450 feet north of said railroad bridge, on defendant's said [25] railroad, and at the time when plaintiff was in the act of removing the other four said foreign freight-cars past said frog, and was passing out and over said switch, and about to

enter said spur line of railroad, his said engine in motion, when said four foreign freight-cars which had just been switched south to said point of about 450 feet north of said railroad bridge, came running down northerly on the main line of defendant's said railroad track, a distance of about 200 feet, and the same ran against and struck the tender of the engine-cab in which plaintiff was then and there sitting with great force and violence, throwing plaintiff with great force and violence to the deck of said engine-cab, and violently throwing plaintiff partly out of said engine-cab, and thereby injuring the socket of plaintiff's left hip, injuring his back and spine, and destroying the sight of his left eye.

Plaintiff further says, that the portion of defendant's said railroad, extending from said railroad bridge to said switch, a distance of about 800 feet, is an incline grade, sloping to the north, the incline thereof being to such an extent that cars placed thereon without being set to brakes, or well chocked, would not remain thereon, but would run from said bridge northerly on said railroad and would pass said switch.

[26] That when said four foreign freight-cars had been switched to and brought to said point of about 450 feet north of said railroad bridge, on defendant's said railroad, it then and there became, and was, the duty of said brakemen, and the duty of said foreman, J. M. Kline, who was then and there brakeman in charge of said freight-cars, to set the brakes on said freight-cars and chock the same so that they would not run north on said railroad, the said dis-

tance of about 200 feet to the point where plaintiff was moving the other four of said foreign freight-cars.

That while the plaintiff was in the exercise of due care for his own personal safety, without negligence or fault on his part, and having no warning, nor notice, nor knowledge, was struck by said four foreign freight-cars, which had been switched to and left at said point of about 450 feet north of said railroad bridge, as aforesaid, and without any fault or contributory negligence on his part.

Plaintiff says that when said four foreign freight-cars had been switched to and left at said point of about 450 feet north of said railroad bridge, that it then and there became, and was, the duty of said J. M. Kline, said brakeman, and the other said brakemen, to cause the brakes to be set on said freight-cars and the same securely chocked and fastened so that the same would not leave the place whereon they had been switched to and placed, and would not run north, [27] down said track, to the point where plaintiff was switching and removing the other four of said freight-cars, but on the contrary, said brakemen, and said J. M. Kline, brakeman in charge of said cars, each and all, neglected to perform their duty in that regard, and neglected to set the brakes on any of the said cars which had been switched to said point of about 450 feet north of said railroad bridge, as aforesaid, which it was their duty to do, and that they neglected to chock said cars, and neglected to secure said cars in any other way so as to prevent their running north, as aforesaid, and that on account of

the carelessness and negligence of said J. M. Kline, and the other said brakemen and employees of defendant, to set said brakes, and their neglecting to chock said cars, or in any other way to secure the same against running north as aforesaid, and that in consequence of the negligence of defendant and its said agents and servants to set the brakes on said cars, and their negligence in any way to secure the same, that said four cars ran north on said track, collided with and struck the cab of the engine in which plaintiff was sitting, and thereby caused said injuries and damage to plaintiff.

That defendant and its said agents and servants were negligent and careless in permitting and allowing said four foreign freight-cars to escape and run north, as aforesaid, and violated their duty in that regard.

[28] Plaintiff further says that since said accident he has learned that the brakes on one or two of said cars which came down said track and collided with said engine were old, worn, and defective and insecure, but notwithstanding the said two or three defective brakes, there were yet five good and sufficient brakes on said four cars at the time of said accident, and that if defendant and its said servants had used ordinary care they could *easily discovered* said defective brakes, as such defects were open and apparent and discoverable upon the slightest inspection, and that all such defects could have been easily remedied and guarded against, and that defendant and its said servants were negligent and careless in the discharge of their duty in failing to inspect said

brakes, and were careless and negligent in the discharge of their duty in failing to properly set said brakes, and in failing to chock said cars, so as to prevent the same from running and colliding as aforesaid.

Plaintiff further says, that the knuckles, knuckle pin, and lock pin, and other coupling apparatus on said four cars which collided with said engine was defective at the point where the same were uncoupled from the other said four cars, and that such defect was in this particular, that the knuckles, knuckle pin and lock pin at the head of the draw-bar worked hard, which prevented the knuckle clasp from swinging readily, so that when the pin was raised for uncoupling that there was a tendency to give those four cars [29] which came down and collided as aforesaid, a jerk foreward, slightly causing them to follow down the track to the point where said accident occurred.

That the defect in said uncoupling apparatus was open and apparent on the most casual observation and easily discoverable upon the slightest inspection, and could have been easily remedied and made safe; that defendant and its said servants were negligent and careless in that they made no inspection of said uncoupling apparatus, and that it was carelessness and a negligence on the part of the defendant and its said servants to use said uncoupling apparatus in said defective condition, and in this connection, plaintiff further avers the fact to be, that if defendant and its said agents and servants had used due care as it was their duty so to do, in setting said

brakes, or in chocking said cars, that the same would not have ran down said track and collided with said engine and that said accident would not have occurred, notwithstanding any defect in said coupling or uncoupling apparatus.

Plaintiff further says that if said defendant and its said servants and agents had set the brakes on said four cars, or had caused the same to be chocked, as it was their duty to do, that the same would not have run north on said railroad, and would not have struck the engine-cab in which plaintiff was sitting, and that the plaintiff would not have received [30] said injuries; that defendants, its servants and agents well knew that said freight-cars would not remain on said track at said point without the brakes having been set or said cars well chocked, and very well knew at the time that said cars would not stay on said track without being secured by chocks or brakes.

That defendant, its agents and servants, violated their duty, and were negligent and careless in failing to set said brakes or in chocking said cars so as to prevent the same from running north and colliding with said switch engine which plaintiff was in charge of and operating; and that the defendant and its said agents and servants were careless and negligent in permitting said four cars to so escape and run north and collide, as aforesaid, and were negligent and careless in allowing and permitting said cars to collide, as aforesaid.

Plaintiff further says that before, and at the time when said cars run north and collided with said

switch-engine, as aforesaid, that defendant and its said agents and servants then and there very well knew that said cars without having the brakes set thereon and chocked, would run away, and that plaintiff, or some other employee, would be killed or seriously injured by such collision, or by the exercise of ordinary care and inspection, the defendant and its said agents and servants could have known all of the above-stated facts.

[31] And that if defendant and its said servants had exercised due care as it was then and there their duty so to do, said four freight-cars would not have escaped and run north and collided with the cab of said engine in which plaintiff was then and there sitting, as aforesaid, and that plaintiff would not have been injured and damaged as herein stated; but, on the contrary, plaintiff avers the fact to be, that on account of the failure of defendant and its said agents and servants to perform their said duty, and on account of their negligence and carelessness in allowing and permitting said freight-cars to escape and run north, as aforesaid, and in particular the negligence of said J. M. Kline, the brakeman in charge of said cars, to perform his duty, and his negligence in failing to set said brakes and permitting said cars to run and collide with said engine, plaintiff was injured, and damaged, as aforesaid.

Plaintiff says that it was not his duty to set the brakes on said cars, nor to see that the same were chocked, or in anyway secured, or fastened, and that plaintiff was ignorant of the fact that the brakes had not been set on said four cars, and was ignorant

of the fact that the same had not been chocked so as to prevent their moving or colliding with said engine until too late to avoid said accident, and that plaintiff was ignorant of any defect that might [32] exist in said brakes or coupling apparatus; and that on account of the obstruction of plaintiff's view by the covered cars, and the noise of the engine and cars, he was unable to see said four cars when the same were running toward the engine which he was operating, and that on account of said noise he was unable to hear the said approaching said four cars and could not discover that said four cars were approaching said switch engine by the exercise of ordinary care.

Plaintiff further says that each of the aforesaid negligent and careless acts and omissions on the part of said defendant, said J. M. Kline, and defendant's said agents and servants, was the direct and proximate cause of said accident, and plaintiff's consequent injuries, for which defendant is liable, and that said injuries consisted of bruises and cuts, internal injury of the chest and lungs, injury to his back and spine, serious shock and jar, four broken ribs, left hip greatly injured, and that by reason of said shock and jar, plaintiff has completely lost the sight of his left eye.

Plaintiff says that the cars he was moving and the cars which collided with said engine were in use, and had been in common and regular use, upon the lines of the said road of defendant, engaged in moving and transporting interstate commerce and traffic, and that said cars were at the time of said accident being used in connection with other cars of the de-

fendant in switching, making up and distribution [33] of interstate commerce traffic over defendant's said line of railroad.

That before the time that the said accident occurred, both eyes of the plaintiff were strong and healthy, and his vision was clear and distinct, and he was able to see perfectly; that on account of said accident plaintiff has suffered great pain and still suffers, and will suffer great pain, as the result of the injuries complained about; that plaintiff after said injuries, placed himself under the care of a skilled oculist, aurist, and surgeon with the hope and purpose of saving his sight, if possible, and also of having his wounds about his body, eyes, back and spine, properly and safely cared for and cured, but under the most careful skill and treatment the sight could not be restored to his left eye, his said broken ribs have not and will not heal, nor get well, and the same press against his lungs and give him pain, and as the result of said shock and jar, he has spinal and nervous affectations.

That plaintiff, while undergoing treatment for said injuries and up to the present time, has been totally unfit and unable to engage in any work, and by reason of his enforced idleness for a period of nine months has lost about $1,575.00 in wages; and his physical condition is such at present that it may be many months and years before he will [34] be able to make a living for himself, if ever.

That since said accident and on account thereof, plaintiff has been obliged to be under medical treatment and at an expense of $300.00, and had been out

for medical care and attention the further sum of $800.00 and is still under the care of a physician; that plaintiff is a locomotive engineer by trade, and at the time of his injury was 65 years of age, in good bodily health and condition, and never before had any sickness; that at the time of his injury he was earning, and was physically able to earn, the sum of $175.00 for 28 days' work as a locomotive engineer, which salary the defendant was paying plaintiff at the date of said injury, for his services as said locomotive engineer.

Plaintiff further represents and shows to the Court, that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as the "Federal Employer's Liability Act," which said act is now in full force and effect in the Territory (now State) of Arizona and in the Territory (now State) of New Mexico, and was at the time and place of the happening of said accident, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of the defendant as a common carrier in the Territory (now State) of Arizona, as well as to the rule of evidence governing such actions, and the measure of damage, which said act, on which plaintiff relies for recovery herein, as well as the [35] fact that plaintiff and defendant are both residents and citizens of said District Court of the United States for the District of Arizona.

Plaintiff says that the defendant company, by its said acts, deeds, negligence and carelessness of its

officers, servants and agents, has wrongfully deprived the plaintiff of his means of support, and that in addition to said expenditure of money for medical treatment, loss of time, loss of wages, physical and mental pain, he has suffered damage, by reason of the destruction and loss of sight of his left eye, four broken ribs, bruised hip-joint, injured back and spine, bodily disfigurement, and on account thereof, he has suffered damages to the amount of forty thousand ($40,000.00) dollars.

WHEREFORE, plaintiff demands judgment against defendant as follows: $1,575.00 for loss of wages; $1,100.00 expenditure on account of said medical treatment; and, said $40,000.00—aggregating the sum of $42,675.00, for which sum and amount, plaintiff demands judgment against said defendant, together with the cost and disbursements of this action.

L. KEARNEY,
Attorney for the Plaintiff.

[36] [Endorsements]: (4) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Amended Complaint. Filed April 4th, 1912, at 9 A. M. Allan B. Jaynes, Clerk. By W. E. Boggs, Deputy. L. Kearney, Attorney for Plaintiff, Clifton, Arizona.

Service by copy admitted this 1 day of April, 1912, at Clifton, Arizona.

McFARLAND & HAMPTON,
Attorneys for Defendant.

[37] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Affidavit of Nonwaiver of Right of Transfer.

State of Arizona,
County of Greenlee,—ss.

L. Kearney, being duly sworn, deposes and says: that he is attorney of record for the above-named plaintiff in said court and cause; that on April 5th, 1912, at Clifton, Greenlee County, State of Arizona, he personally served all of the hereto annexed papers on the above-named defendant, by then and there delivering to and leaving with McFarland & Hampton, in person, true copies thereof; that said McFarland & Hampton, at the time of said service were the attorneys for defendant in said cause and court; that on April 6th, 1912, all of the said annexed papers were lodged with the Clerk of the Superior Court of the County of Gila, State of Arizona, and the same were, on April 8th, 1912, duly presented to the Judge of the Superior Court of said Gila County, with request that he make the order requested in said annexed papers, who thereupon declined to make the order for removal requested in the annexed petition, on the ground as claimed by said Superior Judge,

that all the records and files of [38] said cause had prior thereto been transferred, that the same never were lodged in nor became a part of the records of said Superior Court, and that he had no jurisdiction of said action, and thereupon returned all of the hereto annexed papers to this affiant.

L. KEARNEY.

Subscribed and sworn to before me this 11th day of April, 1912.

My commission expires June 28, 1913.

[Seal] EUGENE SCHWAB,
Notary Public.

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[39] *In the Superior Court of the County of Gila, State of Arizona.*

"COPY."

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Notice of Application for Removal to Federal Court.

To Messrs. McFarland & Hampton, Attorneys for Defendant.

Dear Sirs: Please take notice, that on the annexed petition, which is herewith served upon you, I will move the Judge of the Superior Court of the County of Gila, State of Arizona, at the courthouse in the city of Globe, Gila County, Arizona, on April 8th,

1912, at the hour of ten in the forenoon, or as soon thereafter as counsel can be heard, for an order transferring, removing and transmitting the above-entitled action, together with all process, pleadings, and the entire record of said cause, to the District Court of the United States for the District of Arizona, and that the clerk make the proper certificate and file the same in said Federal Court that he has transferred the entire record of said cause to said Federal Court.

Dated April 4th, 1912.

[40] L. KEARNEY,

Attorney for the Plaintiff, Clifton, Arizona.

[Order Transferring Cause to U. S. District Court.]

In the Superior Court of the County of Gila, State of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

In the Matter of the Removal of Said Cause to District Court of the United States for the District of Arizona.

It appearing to the Court from the petition filed, which is duly verified, and the same is hereto annexed, that plaintiff is entitled to a removal of said cause on the grounds stated in said petition, and that

all the records and files in said cause ought to be transferred as demanded in said petition.

THEREFORE, it is accordingly ordered that this cause, all the records and files therein, and the same is hereby, removed and transferred to the District Court of the United States, for the District of Arizona, and the Clerk of said Superior Court of Gila County is hereby ordered to cause all records and files of said cause, including this order and said annexed petition, to be forthwith transferred to said District Court for Arizona.

[41] Dated April ——, 1912.

_____,

Judge of Said Superior Court.

State of Arizona,
County of Gila,—ss.

I, J. M. Wentworth, Clerk of the Superior Court of the County of Gila, State of Arizona, do hereby certify that the above is the original order of the Judge of said Superior Court and his genuine signature thereto attached; and I further certify that all records, papers and files in the said cause and described in said petition, were on March 19th, 1912, duly transferred to said District Court of the United States for the District of Arizona, and that the above order together with said petition hereto annexed, is hereby transferred to said Federal Court, at Phoenix, Arizona.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Superior Court,

at the city of Globe, State of Arizona, on this —— day of April, A. D. 1912.

_____,

Clerk of Said Superior Court.

[42] *In the Superior Court of the County of Gila, in the State of Arizona.*

State of Arizona,
County of Greenlee,—ss.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Application for Removal of this case to the District Court of the United States for the District of Arizona.

To the Honorable the Superior Court of the County of Gila, State of Arizona:

The petition of Thomas P. Clark, the above-named plaintiff, alleges and respectfully shows to this Court, that is to say: (1) That your petitioner on or about January 19th, 1912, as plaintiff, filed a certain suit in the District Court of the Fifth Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, in which action your petitioner was the plaintiff, the said, "The Arizona and New Mexico

Railway Company, a corporation," was the defendant; that on or about January 19th, 1912, the complaint therein was lodged and filed in the office of the Clerk of said the District Court of the Fifth Judicial District of the Territory of Arizona, [43] at Globe, Arizona, and on the same day, the Clerk of said last-named court, Hon. George H. Smalley, duly issued a summons in said action, and which said action was designated as No. 29–A, on the Federal side of the last-named court; that said summons was duly served on said defendant at said Greenlee County, and it thereafter filed in said last-named court its answer.

That said plaintiff is and was at the time of bringing said suit a resident and a citizen of Greenlee County, Arizona, in the said Fifth Judicial District, and that said defendant is and was at the time of bringing said suit a corporation duly organized and existing under the laws of the Territory (now State) of Arizona, domiciled at Clifton, in said Greenlee County, and a citizen of the Territory (now State) of Arizona, a resident and citizen of said Fifth Judicial District of the Territory (now State) of Arizona, and is yet such corporation, citizen and resident.

(2) That said suit is of a civil nature and arises under the laws of the United States, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum and value of more than Five Thousand ($5,000) Dollars, all of which will hereinafter more fully appear.

(3) That said plaintiff, this petitioner, alleges in

his said complaint, filed in said suit in the said District [44] Court of the Fifth Judicial District of the Territory of Arizona, among other things, that said defendant is and was on the day thereinbefore mentioned engaged in the business of running and operating a railroad from the town of Clifton, in said Greenlee County, Arizona, to Hachita, Territory of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, is a railway corporation, and during the times therein mentioned the defendant was, and yet is, a common carrier of freight and passengers for hire, and as common carrier operates freight and passenger trains for hire, in and through the said territories, on said line of railroad, between said points, and was during the time and places therein mentioned engaged in interstate commerce on, over and through said line of railroad, and that defendant employed a large number of brakemen, and other employees, whose business it was to run and operate said trains for hire, and were at the times and places therein mentioned employees of the defendant and as such servants were engaged in said interstate commerce for defendant on its said railroad.

That it is further alleged in said complaint that on or about March 15th, 1911, said plaintiff was employed by defendant as a locomotive engineer on said railroad, in the service and employ of defendant for hire, and as such locomotive engineer had charge of and was running a switch engine for defendant, in the railway yards of defendant, at said [45] town of Clifton, on said railroad, engaged in said inter-

state commerce for the defendant, and that plaintiff while in the actual discharge of his duties and employed in said interstate commerce, on said railroad, for defendant, was injured through the carelessness and negligence of defendant and its servants.

That it further alleged in said complaint, that during the time mentioned in said complaint, that defendant maintained a large number of tracks and switches for the storage of cars and the making up of trains thereon, and the same being a part of the said railroad of defendant; that from the defendant's railroad depot said railroad at said town of Clifton, at a point of about a quarter of a mile therefrom, southerly in said town of Clifton, on said railroad, there is a spur line of railroad leading off from defendant's said railroad, in a southwesterly direction a distance of about three-quarters of a mile to the Shannon Copper Company's smelter, which is known as the Shannon switch, which switch is about 800 feet north of the defendant's railroad bridge which crosses the San Francisco River, in said town, at said point; that the defendant's said line of railroad from said railroad to said Shannon switch is a grade, sloping *the* north and the grade thereof being to such an extent that cars placed thereon without [46] having the brakes set or the same well chocked, will not remain on that portion of said track, but will run north on said railroad from said bridge, past said Shannon switch, a distance of over 800 feet; that on March 15th, 1911, there were in the said railroad yards of defendant at said Clifton 12

foreign freight-cars, owned by A. T. & S. F. Ry. Co. and C. & S. Ry., which said 12 cars were loaded with coke and merchandise, which were brought from some point beyond the Territory (now State) of Arizona, over defendant's said line of railroad, and the same were consigned to the said Shannon Copper Company; that plaintiff on March 15th, 1911, was directed by defendant and its duly authorized agents to cause said 12 foreign freight-cars to be removed from defendant's said yards, and the same taken over said Shannon switch to said Shannon Copper Company's smelter; that in the removal of said freight-cars there were assisting plaintiff the following persons: John T. Kelly, yardmaster; J. M. Kline, foreman; T. J. St. Thomas and Jesse Murphy, brakemen, who were the crew of helpers and employees of defendant in said railroad service; that said spur line of railroad from said Shannon switch to said Shannon Copper Company's smelter is up a steep grade and so much of a steep grade that said switch engine was unable to take more than four of said freight-cars at any one trip; that four of said freight-cars had been taken up to said smelter and the other eight remained on said track between said Shannon switch and said [47] railroad bridge and on the second trip said eight cars had been brought down by said switch engine within about 450 feet to the south of said Shannon switch when four of them were cut off to take the same up to said Shannon Copper Company's smelter, which left four of said freight-cars on defendant's main line of railroad within 200 feet to the north of said Shannon

switch, and at a time when plaintiff was in the act of moving the said four freight-cars which had just been cut off, and was in the act of passing out over the frog and going onto said spur line, his said engine in motion, the said four freight-cars which had been left on the main line just north of said Shannon switch and within 200 feet of the same, came running down said grade and ran against the tender of the engine in which plaintiff was then and there operating and striking the same with great force and violence, throwing plaintiff to the deck of said engine-cab and thereby injuring his back and spine, breaking four of his ribs, and destroying the sight of his left eye.

That plaintiff further alleges in his said complaint that when said four cars had been cut off as aforesaid and left on said incline grade, about two hundred feet or more south of said switch that it then and there became the duty of the said foreman and said brakemen to set the brakes of said cars and to chock the same so that they would not run [48] down said track and collide with the engine on which plaintiff was operating, and that it was negligence of said defendant and its said foreman and brakemen to leave said four cars without the brakes having been set thereon and same secured against running away and colliding as aforesaid, and that said servants neglected and violated their duty in failing to secure said cars by brakes or proper chocks; that while plaintiff was in the exercise of due care for his own personal safety, without negligence or fault on his part, and having no warning, nor notice, nor

knowledge, was struck by said four freight-cars, without any fault or contributory negligence on his part; that defendant and its said brakemen very well knew that said freight-cars would not remain on said track without having the brakes set thereon and violated their duty in failing to set the brakes thereon, and very well knew that plaintiff or some other employee would be killed or seriously injured by such a collision, or by the exercise of ordinary care and inspection could have known all of the above facts, and that if said brakemen had exercised due care as it was their duty so to do, said four freight-cars would not have escaped and collided with said engine and plaintiff would not have been injured and damaged as aforesaid, but on the contrary on account of the negligence and carelessness of said brakemen and servants of defendant to perform their said duty, plaintiff [49] was injured as aforesaid; that plaintiff says it was not his duty to set said brakes and that he was ignorant that the brakes had not been set thereon, and that on account of his view being obstructed by covered cars he was unable to see said approaching four cars and on account of the noise of his engine he was unable to hear the same and could not discover that the same were approaching said engine by the exercise of ordinary care.

Plaintiff further alleges in said complaint, that each of the aforesaid negligent acts and omissions on the part of defendant and its said servants, was the direct and proximate cause of said injury and accident and plaintiff's consequent injuries, for

which the defendant is liable; that on account of said injury plaintiff has expended large sums of money, enforced idleness, rendered unable to earn a living for himself, and that before said injury he was a strong and healthy man, his eyesight was strong and his vision clear; that at the time of said injury he was able to earn and was earning a salary of $175 for 28 days' work as said locomotive engineer, and that on account of said injury he has been damaged in the sum of $42,675, which is demanded against defendant in said complaint;

It is further alleged in said complaint, that on or about the 22d day of April, 1908, the Congress of the [50] United States of America passed and approved what is known as the "Federal Employer's Liability Act" which act is now in full force and effect in the Territory (now State) of Arizona, and was at the time and place of the happening of said accident and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of the defendant as a common carrier in the Territory of Arizona, as well as the rule of evidence governing such actions, and the measure of damages, which said act, on which plaintiff relies for recovery herein, as well as the fact that plaintiff and defendant are both residents and citizens of said Fifth Judicial District of the Territory of Arizona;

That in said complaint, on account of said facts, and the sustaining of the said injuries, plaintiff demands judgment against said defendant for the sum of Forty-two Thousand Six Hundred and Seventy-

five Dollars, together with costs of suit.

Your petitioner further shows to this Court, that the said Territory of Arizona, by virtue of an act of the said Congress, passed and approved June 20th, 1910, and proclamation of the President of the said United States, became the State of Arizona on February 14th, 1912, when said suit was pending in said Fifth Judicial District of the said Territory of Arizona, and the said complaint and answer [51] were on file with the clerk of said District Court at Globe, Arizona.

That the said act admitting Arizona as a state, by the provisions of Sec. 31 thereof, created the State of Arizona one federal jurisdiction, attached to the Ninth Judicial Circuit and providing that one district judge shall be appointed by the President of the United States for said district of Arizona.

That Sec. 33 of the enabling act admitting Arizona as a State, provided among other things, that the said district court so created for the State of Arizona, shall have jurisdiction to hear and determine all trials and proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the supreme court of the said Territory at the date of its admission as a State, the case being such that, under the laws of the United States touching the jurisdiction of Federal courts, it might properly have been begun in or (as a separate controversy or otherwise) removed to said Circuit or said District Court had they been established when the litigation of such case or controversy was commenced. Should such case or

controversy be such that, if begun within a State, it would have fallen within the exclusive cognizance of a Circuit or District Court of the United States sitting therein, it shall be transferred to one or the other of said courts sitting within said State of Arizona, [52] with due regard for the general provisions of law defining their respective jurisdiction; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for the removal of cases from State or Federal courts, and no later than sixty days after the lodgment of the record of such case or controversy in the proper court of the State as herein provided.

Your petitioner further states that the record of his said case was lodged in the said Superior Court of the County of Gila, on or about February 19th, 1912, and that he further says it is such a case as falls within the concurrent, but not the exclusive jurisdiction of said District Court for Arizona, and that he is entitled to have the record of his said case removed to the District Court of the United States for the District of Arizona.

Your petitioner therefore prays this honorable Court to proceed no further herein, except to make an order of removal as required by law, and to cause the record in said case to be removed into the said District Court of the United States for the District

of Arizona, according to the statute in such case made and provided.

And your petitioner will ever pray.

[53] THOMAS P. CLARK,
Petitioner.

L. KEARNEY,
Petitioner's Attorney, Clifton, Arizona.

State of Arizona,
County of Greenlee,—ss.

Thomas P. Clark, being duly sworn, deposes and says, that he is the petitioner above named; that he has heard read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

THOMAS P. CLARK.

Subscribed and sworn to before me this 4th day of April, A. D. 1912.

My commission expires February 15th, 1916.

[Seal] L. KEARNEY,
Notary Public.

[54] [Endorsements]: (5.) No. 14. In the District Court of the United States, for the District of Arizona. Thomas P. Clark, vs. The Arizona and New Mexico Railway Company, a Corporation. Petition for Order of Transfer of Cause, and Certificate Thereof, and Affidavit of Denial of the Application. Filed April 13th, 1912, at 10:00 A. M. Allan B. Jaynes, Clerk. W. E Boggs, Deputy.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Second Amended Complaint.

Plaintiff in this his second amended complaint, complains of defendant and alleges:

1.

Plaintiff during the time mentioned herein has been, and is, a resident and citizen of the town of Clifton, State (formerly Territory) of Arizona.

That defendant during the time herein mentioned has been, and yet is, a railroad corporation, duly incorporated under the laws of the Territory (now State) of Arizona, and doing business as such in said Territory (now State), under its corporate name, "The Arizona and New Mexico Railway Company," and that it is domiciled at, has and maintains [55] its general office, where all its records are kept, at the town of Clifton, in Greenlee County, Territory (now State) of Arizona, and is an inhabitant and citizen of said town, in said judicial district.

2.

That defendant is now, and was, on the day hereinafter mentioned, engaged in the business of running and operating a railroad from said town of Clifton,

to Hachita, Territory (now State) of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and that defendant was, and yet is, a common carrier of freight and passengers for hire, and as such common carrier operates freight and passenger trains for hire, in, on, over and through said railroad, between said points, and during the time herein mentioned was engaged in interstate commerce on, over and through said line of railroad, and that it employed a large number of brakemen, and other employees, whose business it was to run and operate said trains for hire, and were at the times and places herein mentioned employees of defendant and as such servants were engaged in said interstate commerce on said railroad for the defendant.

3.

That at said town of Clifton, during the time herein mentioned, defendant has owned and maintained, as a part of its said railroad, a large number of tracks, turnouts and switches for the storage of cars, and for the making [56] up of trains thereon, the same being the yards of defendant;

That said tracks and switches extend from defendant's railroad depot at said town of Clifton, southerly through said town, a distance of about one-quarter mile, to a point where defendant's railroad bridge crosses the San Francisco River;

That at a point of about 800 feet north of said railroad bridge, on said railroad track, there is a switch railroad which runs in a southerly direction a distance of about one-half mile, to the Shannon

Copper Company's smelter; that said switch line of railroad during the time herein mentioned was in the use of defendant, as a part of its said railroad; that said switch line of railroad is up a steep grade, and that the grade thereof being so steep that the engine herein mentioned was unable to move more than four cars at any one trip over the same, and must move rapidly in order to pass said grade.

That that portion of defendant's said railroad track, from said railroad bridge to said switch, said distance of about 800 feet, is downgrade, sloping to the north, the incline thereof being to such an extent that cars placed thereon, without brakes set on the cars, or the same well chocked, would not remain on said track, but would run northerly to and past said switch, and that this portion of defendant's said railroad track was in such condition at the time [57] of the accident and injury hereinafter mentioned.

4.

That on March 15th, 1911, there were in said railroad yards, at said Clifton, twelve foreign freight-cars, which were in part owned by Atchison, Topeka & Santa Fe Railway Company, and in part owned by Colorado and Southern Railway Company, and other railway companies, but of what other companies plaintiff does not know; that said foreign freight-cars were loaded with coke and merchandise, and the same had been brought in from some point beyond the Territory (now State) of Arizona on and over defendant's said railroad, by defendant, to said town of Clifton, and which said foreign freight-cars

were consigned to said Shannon Copper Company.

5.

That on and prior to March 15th, 1911, plaintiff was employed by defendant as a locomotive engineer on said railroad, engaged in said interstate commerce for defendant, in the service and employ of defendant for hire, and as such locomotive engineer had charge of, and was running a switch engine for defendant, in said railroad yards of defendant, at said town of Clifton, which said engine at the time of the injury herein complained of, was owned by defendant and in use of said interstate commerce.

6.

Plaintiff says that on or about March 15th, 1911, as [58] such locomotive engineer, he was ordered and directed by defendants and its duly authorized agents, to take said switch engine and remove said 12 foreign freight-cars from defendant's said yards and take the same over said switch railroad to said Shannon Copper Company's smelter;

That in the removal of said 12 foreign freight-cars there were a part of the time assisting plaintiff, the following named persons: John T. Kelly, yardmaster; J. M. Kline, foreman; G. F. Chambers, fireman; T. J. St. Thomas and Jesse Murphy, brakemen—who were the crew of helpers, and all of whom were then and there employees, agents and servants of defendant, in the hire of defendant, in said railroad service.

That in said service, in the removal of said cars, it was the duty of said employees to warn plaintiff of any approaching cars which might collide with

said switch engine, warn plaintiff of all dangers, and to give signals to plaintiff to start, run and stop said switch engine, and it was the duty of plaintiff to obey said signals.

7.

That plaintiff and said crew began the removal of said 12 freight-cars on said March 15th, 1911, and eight of said cars were brought down to a point of about 450 feet north of said bridge and 200 feet south of said [59] switch, when four thereof were uncoupled and left on said railroad track at said point, and four thereof were coupled to said switch engine and by the plaintiff were being moved down defendant's said track to enter said switch and take the same to Shannon Copper Company's smelter.

That when said four cars had been uncoupled and left at said point of about 200 feet south of said switch, that it then and there became, and was, the duty of said J. M. Kline, T. J. St. Thomas and John T. Kelly, the persons in charge of the same, to cause the brakes to be set on said four freight-cars, left at said point, and to securely chock and fasten the same, so that they would not run down said track, to the point where plaintiff was removing the other four of said freight-cars onto said switch, but on the contrary, said J. M. Kline, T. J. St. Thomas and John T. Kelly, each and all, neglected to perform their duty in that regard, and carelessly and negligently failed to set the brakes on said four cars, left at said point, and neglected to secure the same in any way to prevent their running north, and on account of said negligence and carelessness, the said four

freight-cars, when plaintiff was entering said switch railroad, his said engine in motion, the said four freight-cars which had been left at said point of about 200 feet south of said switch, as aforesaid, came running northerly down the main line of defendant's said railroad track, and when the same was near plaintiff's [60] said engine, the said T. M. Kline and T. J. St. Thomas, the foreman and brakeman in charge of said freight-cars, without caution or care, and having no regard for the personal safety of plaintiff, carelessly and negligently, signaled plaintiff to stop his engine, whereupon, plaintiff not knowing what was the matter, immediately set the brakes on his said engine, bringing it to a stop, and within 8 seconds thereafter, the said four freight-cars ran against and struck the tender of the engine-cab in which plaintiff was then and there sitting, with great force, and thereby violently throwing plaintiff to the deck of the engine-cab and partly out of said cab, and thereby injuring the socket of plaintiff's left hip, injuring his back and spine, destroying the sight of his left eye, breaking four of his ribs, and otherwise injuring plaintiff.

Plaintiff further says that the stopping of said engine in obedience to said signal caused said four freight-cars to strike said engine squarely and with great force, and thereby increased the violence of said collision, which materially aided in producing plaintiff's said injuries, and that plaintiff's said injuries were also caused by the insufficient number of brakemen to manage said cars, that said roadbed was defective and unsafe, that the brakes on said cars

and the coupling apparatus was out of repair and unsafe, [61] that the defendant did not inspect its roadbed and said cars, and did not furnish plaintiff a reasonably safe place in which to perform said work, and that defendant and its said servants so negligently and carelessly ran, managed and operated said freight-cars and engine, whereby said collision was caused, and plaintiff injured, as aforesaid.

Plaintiff further says that before, and at the time when said cars ran north and collided with said engine, that defendant and its said agents and servants then and there very well knew that said cars without having the brakes set thereon, and chocked, would not remain on said track, and knew that the same would run away, and knew that said railroad track was defective and unsafe, that the brakes and coupling apparatus of said cars was defective and unsafe, and knew that plaintiff, or some other employee, would be killed or seriously injured by such collision, or by the exercise of ordinary care and inspection, the defendant and its said agents and servants could have known all of the above facts.

Plaintiff further says that the defective condition of said roadbed, track, and cars, and in connection therewith that each of the aforesaid negligent and careless acts and omissions on the part of defendant and its said agents and servants was the direct and proximate cause [62] of said accident, and plaintiff's consequent injuries, for which defendant is liable, and that said injuries consisted of bruises and cuts, internal injury of his chest and lungs, injury to his back and spine, serious shock and jar, four

broken ribs, injury to his left hip, and that by reason of said bruises, said shock and jar, he has completely lost the sight of his left eye and his person disfigured.

8.

Plaintiff further says that while he was in said service of defendant, as locomotive engineer, in the exercise of due care for his own personal safety, without negligence or fault on his part, having no warning, nor notice, nor knowledge, was injured as aforesaid, and that on account of his view being obstructed by covered cars he was unable to see said four approaching cars, and on account of the noise of his engine and cars he was unable to hear the same, and could not discover that said cars were about to collide with his engine by the exercise of ordinary care, until too late to avoid said accident.

9.

Plaintiff further says that the cars he was moving and which collided with said engine were in use and had been in common and regular use upon the line of the said railroad of defendant, engaged in moving and transporting interstate commerce and traffic, and that said cars were at the time of said accident, being used in making up distribution of interstate commerce, and as a common carrier of [63] traffic over defendant's said line of railroad.

10.

That before and on the day of said accident and just prior thereto, both eyes of plaintiff were strong and healthy, and his vision was clear and distinct, and he was able to see perfectly.

That on account of said accident plaintiff has

suffered great pain and still suffers, and will suffer great pain, as the result of the injuries complained about.

That plaintiff after said injuries, placed himself under the care of a skilled oculist, and surgeon with the hope and purpose of saving his sight, if possible, and also of having his body, ribs, back and spine properly cared for and cured, but under the most careful skill and treatment the sight could not be restored to his left eye, his said broken ribs have not and will not heal, and the same press against his lungs and give him pain, and as the result of said shock and jar, he has spinal and nervous affectations, and personally disfigured.

That from the date of said injuries plaintiff has been undergoing treatment for the same, and up to the present time, has been totally unfit and unable to engage in any work, and by reason of his enforced idleness for a period of the past thirteen months he has lost about $2,450.00 in wages; and that his physical condition is such at present that it may be years before he will be able to make a living for himself, if ever.

[64] That since said accident and on account thereof, plaintiff has been obliged to be under medical treatment at the reasonable expense of $300.00, and has been out for medical care and attention the further and reasonable sum of $800.00, and is still at expense under the care of a physician.

That plaintiff is a locomotive engineer by trade, and at the time of his injury was 65 years of age, in good bodily health and condition, and never before

had any sickness.

That plaintiff at the time of his injury was earning, and was physically able to earn, the sum of $175.00 for 28 days' work as a locomotive engineer, which salary defendant was paying plaintiff at the date of said injury, for his services, as said locomotive engineer.

11.

Plaintiff further represents and shows to the Court, that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as the "Federal Employer's Liability Act," which said act is now in full force and effect in the Territory (now State) of Arizona and in the Territory (now State) of New Mexico, and was at the time and place of the happening of said accident, in full force in the Territory of Arizona, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of defendant as a common carrier in the Territory (now State) of Arizona, as well as the rule of evidence governing such actions, and the measure of [65] damages, which said act, on which plaintiff relies for a recovery herein.

12.

Plaintiff further says that the defendant company, by its said acts, deeds, negligence and carelessness of its officers, agents and servants, has wrongfully deprived the plaintiff of his means of support, and that in addition to said expenditure of money for medical treatment, loss of time, loss of wages, physical and

mental pain, he has suffered damage by reason of the destruction and loss of sight of his left eye, four broken ribs, bruised hip-joint, injured back and spine, bodily disfigurement, and on account thereof, and of said injuries, to the amount of Forty Thousand ($40,000.00) Dollars, none of which have ever been paid plaintiff.

SECOND COUNT.

SECOND CAUSE OF ACTION.

Comes now the plaintiff, and for a second cause of action against said defendant, alleges as follows:

Repeats allegations of paragraphs Nos. 1 to 6 inclusive, of the plaintiff's first cause of action, hereinbefore alleged.

2.

That on March 15th, 1911, while plaintiff was in defendant's employ as a locomotive engineer in defendant's said yards at said Clifton, and was in the act of entering said switch railroad with said switch engine and four of said foreign freight-cars, when four of said foreign freight-cars [66] which had been left at said point of about 200 feet south of said switch ran northerly down defendant's said track and with great force collided with the engine which plaintiff was running, and thereby violently throwing plaintiff to the deck of said engine-cab, and thereby injuring plaintiff's hip, back, spine, breaking four of his ribs, destroying the sight of his left eye, bruising and otherwise injuring him; that plaintiff's said injury was caused by the negligent manner in which defendant's employees having the then control of the

engine, cars and signals at said point conducted themselves in the management of said cars, engine and signals, and was also caused by the negligence of defendant's officers, servants and employees, and was also caused by defects in defendant's ways, works, machinery, appliances, plant, cars, engine, tracks, roadbed, and signals at said place, and by the defendant's neglect to formulate, promulgate, and enforce proper rules and regulations for the safety of plaintiff and his coemployees, in that defendant conducted its works by unsafe and dangerous methods, and did have an improper signal system, and an unsafe place for plaintiff to perform said work, and conducted its works by insufficient signals, material and men, in that defendant, charged with superintendence, control and command over plaintiff and his coemployees, negligently and carelessly conducted itself in and in connection with said [67] acts, control, and command, as a result of all of which, said four freight-cars were permitted to collide with said engine, and as a result thereof plaintiff sustained said injuries, all being caused without any negligence on the part of plaintiff in any wise contributing thereto; that plaintiff sustained said injuries while in defendant's employ, while said defendant and plaintiff were then and there engaged in interstate commerce between the different States of the United States, and that the said engine at the time of said collision was then and there carrying and transporting interstate commerce, and the employees working in connection therewith were engaged in interstate commerce, and the cars which collided

with said engine were then being employed in interstate commerce.

That by reason of said premises, plaintiff has sustained damages in the sum of Forty-three Thousand Five Hundred and Fifty Dollars.

That plaintiff here repeats allegations of paragraphs Nos. 10, 11, and 12, inclusive, of plaintiff's first cause of action hereinbefore alleged.

WHEREFORE, plaintiff demands judgment against defendant as follows: $2,450.00 for loss of wages; $1,100.00 expenditure on account of said medical treatment; and said $40,000.00 damages; the whole thereof aggregating the sum and amount of Forty-three Thousand Five Hundred and Fifty ($43,550.00) Dollars, for which aggregate sum plaintiff demands judgment [68] against the defendant, together with the costs and disbursements of this action.

L. KEARNEY,

Attorney for the Plaintiff, Residing at Clifton, Arizona.

[Endorsements]: (6.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark vs. The Arizona and New Mexico Railway Company, a Corporation. Second Amended Complaint. Filed April 27, 1912, at 2:00 P. M. Allan B. Jaynes, Clerk. By W. E. Boggs, Deputy. L. Kearney, Attorney for Plaintiff, Clifton, Arizona. Service by copy admitted this 25 day of April, 1912. McFarland & Hampton, Attorneys for Defendant.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Motion to Make More Definite and Certain.

Comes now the defendant in the above-entitled cause and moves the Court for an order directing the plaintiff to make his first cause of action more definite and certain, in this,

[69] I.

No facts are alleged in that part of plaintiff's second complaint beginning on page 3, with the words "that portion of defendant's railroad track" and ending with the words "an injury hereinafter mentioned," showing or tending to show the grade of defendant's railway, is such that cars placed thereon would not remain on said track without being chocked or the brakes being set on said cars. Said complaint is further indefinite and uncertain in that part of plaintiff's complaint on page 6, beginning with the words "plaintiff further says," and ending on page 7 with the words "and plaintiff injured as aforesaid," for the reason that no facts or facts are alleged showing or tending to show the number of brakemen employed by defendant at the date of said alleged accident. Said complaint is

further indefinite and uncertain in that no facts are alleged showing or tending to show in what respect or in what way the brakes or coupling apparatus on the cars were defective or in what respect and in what way the brakes or coupling apparatus were out of repair and unsafe. Said complaint is further indefinite and uncertain in that no facts are alleged showing or tending to show that defendant failed to discharge its duty in the inspection of its said cars and said complaint is further indefinite and uncertain in that no facts are alleged showing or tending to show that its roadbed at the point or points set forth in said complaint was defective and unsafe and said complaint is further indefinite [70] and uncertain as no fact or facts are alleged showing or tending to show that the defendant did not furnish plaintiff with a reasonably safe place in which to perform his work and said complaint is further indefinite and uncertain, in that it fails to state any fact or facts showing or tending to show that defendant and its servants negligently or carelessly ran, managed or operated its said cars and engines at the date of said accident or at any time. Plaintiff's said complaint is further indefinite and uncertain in that portion thereof beginning on page 7 with the words "plaintiff further says that before" and ending with the words, "and servants could have known of the above facts," in the failure of plaintiff to allege any fact or facts showing or tending to show that defendant, its agents or servants had any knowledge that the cars would not remain standing without being chocked or the brakes set on said cars;

that no fact or facts are alleged showing or tending to show the grade at said points or between the points set forth in plaintiff's said complaint. Plaintiff's said complaint is further indefinite and uncertain in that part thereof beginning on page 5 with the words "plaintiff says that on or about March 15, 1911," and ending with the words "to said Shannon Copper Company Smelter," in that no fact or facts are alleged showing or tending to show by what officer, agent or servant of defendant plaintiff was ordered and directed to take said switch engine and remove [71] said cars from defendant's yards and take same over said switch railroad to said Shannon Copper Company's Smelter.

That the allegations of said complaint are so indefinite and uncertain that the precise nature of the charge is not apparent.

II.

Defendant further moves the Court for an order directing the plaintiff to make his alleged second cause of action more definite and certain; that said second alleged cause of action is indefinite and uncertain, in this, that no facts are alleged showing or tending to show any cause or reason why freight-cars left at a point about two hundred feet south of switch, ran northerly down into defendant's track, or any fact or facts alleged showing or tending to show why said cars ran in a northerly direction or any other direction on said track; that no facts are alleged in said second cause of action, showing or tending to show any cause for the injuries to plaintiff as therein particularly set forth, nor any fact

or facts alleged in said second cause of action showing or tending to show any negligence or want of care upon defendant, its agents or servants in respect to signals or no fact or facts are alleged showing or tending to show any negligence on the part of defendant's officers, servants and employees in respect to defendant's ways, works, machinery, appliances, plant, cars, engine, tracks, roadbed and signals at the alleged places or otherwise. Said second alleged cause of action is further indefinite and uncertain, [72] in this, that no fact or facts are alleged showing or tending to show that defendant failed to publish rules or promulgate the same, regulating the safety of plaintiff and his coemployees. Said second alleged cause of action is further indefinite and uncertain, in this, that no fact or facts are alleged showing or tending to show that defendant conducted its work by unsafe and dangerous methods and had an improper signal service or an unsafe place for plaintiff to perform said work. Said cause of action is further indefinite and uncertain in this that no fact or facts are alleged showing or tending to show that defendant conducted its business by insufficient signals, material and men or that defendant and its employees carelessly conducted itself in and in connection with the said acts, control and command or that said alleged negligent acts contributed in any wise to the injury complained of and further said second alleged cause of action is indefinite and uncertain in this, that no facts are alleged showing or tending to show that defendant and plaintiff were engaged in interstate commerce

between the different States of the United States at the date of the alleged accident; that the allegations of said second alleged cause of action are so indefinite and uncertain and repugnant that the precise nature of the charge is not apparent.

_____,

_____,

Attorneys for Defendant.

[73] [Endorsements]: (10.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Motion to Make More Definite and Certain. I hereby accept service of the within motion to make more definite and certain, this the 24th day of May, 1912. L. Kearney, Attorney for Plaintiff. Filed May 28, 1912 at — M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Motion to Strike Second Amended Complaint.

Comes now the defendant in the above-entitled cause and moves the Court to strike the second

amended complaint of plaintiff from the files of the Court.

I.

Because said second amended complaint is double and does not conform to the statutes of Arizona, in this, that [74] said plaintiff has commingled and attempted to unite in his first cause of action in one count several distinct and independent causes of action, in this, an alleged cause of action against the alleged servants of defendant for leaving cars standing on track without brakes set and an alleged cause of action against defendant for failure of defendant to warn plaintiff of the approach of cars and an alleged cause of action against defendant for negligence of defendant's servants in giving signals to plaintiff to stop engine; that the giving of said signals resulted in the collision of cars with plaintiff's engine, and an alleged cause of action against defendant for failure of defendant to supply a sufficient number of brakemen and an alleged cause of action against defendant on account of constructing and maintaining defective roadbeds and an alleged cause of action against defendant by reason of defendant's failure to inspect cars and roadbed and an alleged cause of action for failure to furnish a safe place, and an alleged cause of action against defendant for the negligent management and operation of its cars and engines, and an alleged cause of action against defendant on account of defective brakes on its cars and coupling apparatus; that the same were out of repair and unsafe. Said last cause of action being in violation of the statutory duty imposed by an Act

of Congress of the United States entitled the Safety Appliance Act, approved March 2, 1893, and as amended April 1, 1896, and March 4, 1911. That separate and independent causes [76] of action based upon the alleged negligence of defendant and alleged negligence of servants of defendant under the general law and separate and independent causes of action based upon the statutory duties of defendant are commingled, set forth and alleged in one count in plaintiff's said first cause of action; that defendant can not intelligently plead nor defend said several separate and independent causes of action commingled and set forth in one count in plaintiff's said first cause of action.

II.

Defendant further moved the Court to strike said second amended complaint, because the second alleged cause of action is double and does not comply with the statutes of Arizona; because plaintiff has attempted to unite in one count in said second amended complaint, several distinct and independent causes of action. Defendant hereby refers to and adopts the facts alleged in subdivision one of this motion setting forth the several separate and independent causes of action alleged in Paragraph One of this motion as a part hereof, the several separate and independent causes alleged in plaintiff's first cause being the same separate and independent causes of action attempted to be alleged in one count in plaintiff's alleged second cause of action and further because defendant has commingled and attempted to set forth several separate causes of ac-

tion in one count in said second cause of action based upon the [77] violation of defendant's duty under the general law and several separate and independent causes of action based upon defendant's violation of his statutory duties and that defendant cannot plead or demur to said second cause of action while the same are commingled and set forth in a single count.

III.

And further, because the allegations of said second amended complaint are so indefinite and uncertain that the precise nature of the charge is not apparent.

W. C McFARLAND and
JOHN R. HAMPTON,
Attorneys for Defendant.

[Endorsements]: (11.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Motion to Strike. I hereby accept service of the within motion to strike, this the 24th day of May, 1912. L. Kearney, Attorney for Plaintiff. Filed May 28, 1912, at — M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy.

[78] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Motion to Strike Second Amended Complaint.

Comes now the defendant in the above-entitled cause, and moves the Court to strike from the files of this Court the second amended complaint of plaintiff.

I.

Because said second amended complaint is a proposed amendment of plaintiff's first amended complaint.

II.

Because no leave of the Court was had to file said second amended complaint.

III.

Because no special order of the Court was made authorizing or permitting plaintiff to file a second amended complaint and for the further reason that no leave was obtained from the Court and no special order of the Court was made or entered permitting plaintiff to amend [79] his first amended complaint by filing a second amended complaint.

WHEREFORE, plaintiff moves the Court to

strike said amended complaint from the files of this court.

W. C. McFARLAND and
JOHN R. HAMPTON,
Attorneys for Defendant.

[Endorsements]: (12.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Filed May 28, 1912, at — M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy. Motion to Strike from the Files. I hereby accept service of the within motion to strike from the files this the 24th day of May, 1912. L. Kearney, Attorney for Plaintiff.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Amended Answer.

[80] Defendant for answer to plaintiff's second amended complaint demurs thereto and each of the causes of action therein alleged and for the grounds assigns the following:

I.

Because said second amended complaint nor

neither of the causes of action therein alleged states facts sufficient to constitute a cause of action.

II.

Specially demurs thereto, because said second amended complaint and each of the alleged causes of action is double and does not conform to the statute of the State of Arizona, in this, that neither of said alleged causes of action sets forth a concise statement of the cause of action attempted to be pleaded, but on the contrary in each of said alleged causes of action attempts to set forth in one count numerous, distinct, independent and repugnant breaches of duty on the part of the defendant and separate and distinct causes of action based on alleged negligence on the part of defendant's servants and separate and independent causes of action based upon alleged breaches of statutory duty.

III.

Defendant further specially demurs to that part of said second amended complaint, beginning on page 3, with the words "that that portion of defendant's railroad track" [81] and ending with the words "an injury hereinafter mentioned" because the same does not state any fact or facts showing or tending to show that the grade of defendant's railroad at the points stated is such that cars placed thereon would not remain on said track without being chocked or the brakes being set on said cars, and further specially demurring to that part of plaintiff's said complaint on page 6, thereof, beginning with the words "plaintiff further says," and ending on page 7, with the words "and plaintiff injured as

aforesaid," for the reason that no fact or facts are set forth showing or tending to show that an insufficient number of brakemen were in charge of the train at the date of the accident, that no facts are alleged showing or tending to show that the brakes or the coupling apparatus on the cars were out of repair and unsafe, nor any fact or facts are alleged showing or tending to show that defendant did not inspect its roadbed and said cars, nor any fact or facts are alleged, showing or tending to show that defendant failed to furnish plaintiff a reasonably safe place in which to perform his work; nor any fact or facts are alleged showing or tending to show, that defendant or its said agents or servants, negligently and carelessly ran, managed and operated said freight-cars and engine, and specially demurring to that part of plaintiff's complaint on page 7, beginning with the words "plaintiff further [82] says that before" and ending with the words "and servants could have known all of the above facts," because the same does not state any fact or facts showing or tending to show that defendant, its agents and servants had any knowledge that cars would not remain standing without being chocked or the brakes being set on said cars and further because no fact or facts are alleged showing that defendant, its agents or servants, knew that defendant's railway track was defective and unsafe or that the brakes and coupling apparatus were defective and unsafe.

IV.

Further specially demurring thereto because no

fact or facts are alleged in said complaint showing or tending to show that plaintiff's alleged cause of action comes within the Federal Employer's Liability Act.

V.

Defendant further specially demurs to said complaint, because no fact or facts are alleged showing or tending to show, that defendant or its employees or plaintiff were engaged in interstate commerce at the date of said accident, nor are any fact or facts alleged showing or tending to show that defendant in the operation and movement of its cars was engaged in interstate commerce on the Shannon switch at the date of the accident or any other time.

[83] VI.

Defendant for further answer to said second amended complaint denies each and every allegation therein contained.

VII.

Defendant for further answer to said second amended complaint alleges that on the 15th day of March, 1911, and for many years prior thereto, defendant published and there were in force on said date, certain rules governing the running of its trains and the switching of cars upon its main line of railway and switches and that the plaintiff in this action and in charge of the engine on the said 15th day of March, 1911, had knowledge and was familiar with said rules, the same being in full force and effect on said March 15, 1911. Said rules are in words and figures as follows, to wit:

Rule 90. "Running or flying switches must not

be made except where it would cause great delay to do the work in any other manner; and whenever they are made, the train must first be stopped, and before the engine is again started the switch and also the brakes on the cars to be set out must be tested, and great care used.

Cutting off the engine, with or without part of the cars in the train, before a train has stopped at a station, and allowing the remainder of train to follow, is forbidden. Every train must be brought to a full stop before the engine is uncoupled.

Rule 94. "On all grades, when stopping on the main line or on a siding, when cutting an engine off a train at stations to do work or at any stops of unusual length, the air must be released and a sufficient number of hand-brakes set to hold the train. Both conductors and enginemen will be held responsible for failure to comply with this rule."

That said rule No. 90 prohibited the cutting off of the [84] engine from the cars in the train before a train had been stopped and allowing the remainder of the train to follow and provided that every train must be brought to a full stop before the engine is uncoupled; that under and by virtue of said rules it was the duty of the plaintiff as engineer to see and know when his engine was cut off with or without a part of the cars that said train had been stopped; that brakes had been set and that the cars remaining would not follow; that under and by virtue of said rules and particularly Rule 94 it was the duty of plaintiff as engineer when stopping his engine on the main line or sidings or when cutting

his engine off the train at stations or at any place on the main line of defendant's line or its sidings, with or without cars, to see and know that a sufficient number of hand-brakes were set to hold the train. This rule especially set forth the duties of the engineer in respect to stopping trains to which his engine was attached, on all grades and having failed to discharge this duty as set forth in said Rule 94, at the date of the accident defendant alleges that if plaintiff was injured at the time and place set forth in said amended complaint, said injury was wholly due to the carelessness and negligence of plaintiff in his failure to discharge his duties as engineer as in said rule provided.

[85] VIII.

Defendant for further answer to said complaint alleges that any injuries sustained or suffered by plaintiff at the time or on the occasion in his amended complaint alleged, were caused in whole or were wholly contributed to by the negligence or want of care by said plaintiff, and not by any negligence or default or want of care on the part of this defendant, its agents or servants.

IX.

For further answer defendant alleges that since said accident it has been advised and believes and from the advice and belief, alleges that it had been the custom of its employees including plaintiff, prior to said accident, in switching cars from its main line up the Shannon switch to permit the cars remaining on said main line prior to being switched up said Shannon switch to remain on said main line without

brakes being set; that plaintiff knew of said custom and methods of switching said cars from the main line, up and over said Shannon switch, and having remained in the service of the company with such knowledge and acquiescence and without complaint, assumed the risk incident to such custom and methods; that defendant did not know and could not know by the exercise of ordinary care of the custom and methods aforesaid pursued by its servants including plaintiff in switching cars from its main line up and over said Shannon switch.

[86] Further answering said second amended complaint, defendant alleges that if defendant was injured while in the employ of this defendant, or suffered any damage or injury as alleged in said complaint, none of which is admitted but all of which is specifically denied, the alleged injuries, if any, were wholly and exclusively the results of risks ordinarily incident to the employment in which he was engaged at the time thereof, and which were open to his observation, and known to him, or could have been known by the use of ordinary care in the prosecution of his said work and employment, and that said risks were assumed by said plaintiff.

WHEREFORE, this defendant having fully answered, prays that plaintiff take nothing by his action, and for its costs herein expended.

W. C. McFARLAND and
JOHN R. HAMPTON,
Attorneys for Defendant.

[Endorsements]: (13.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Amended Answer. I hereby accept service of the within amended answer, this the 24th day of May, 1913. L. Kearney, Attorney for Plaintiff. Filed May 28, 1912. Allan B. Jaynes, Clerk.

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[87] No. 14.

THOMAS P. CLARK,

Plaintiff,

Against

THE ARIZONA AND NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at Twelve Thousand Six Hundred and Seventy-five 00/100 Dollars ($12,675.00).

J. E. McCLAIN,
Foreman.

[Endorsements]: No. 14. District Court, District of Arizona. Thos. P. Clark, Plaintiff, vs. The Arizona & New Mex. Ry. Co., Defendant. Verdict. Filed Nov. 16, 1912. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy Clerk.

In the District Court of the United States for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

[88] Judgment.

The above-entitled cause came regularly on for trial on November 12, 1912, and concluded November 16, 1912, the plaintiff appearing by L. Kearney and W. M. Seabury, his attorney, and the defendant appearing by McFarland and Hampton, and Kibbey, Bennett & Bennett, its attorneys, and a jury having been duly and regularly empanelled to try said cause and each of the parties having adduced oral and documentary evidence, the cause having been argued to the jury by respective counsel, and the Court having duly instructed the jury and the jury having retired to consider their verdict and on the 16th day of November, 1912, having returned into court their verdict in favor of the plaintiff in the sum of Twelve Thousand Six Hundred Seventy-five Dollars ($12,675.00), and against the defendant, which verdict was duly received and filed herein.

Now, therefore, by virtue of the law and premises aforesaid, and on motion of W. M. Seabury, attorney for plaintiff, and on the verdict of said jury so ren-

dered as aforesaid.

It is ordered, adjudged and decreed, that plaintiff Thomas P. Clark, do have and recover of and from the defendant The Arizona and New Mexico Railway Company, a corporation, the sum of Twelve Thousand Six Hundred Seventy-five [89] Dollars ($12,675.00), with interest thereon at the rate of 6% per cent per annum from date hereof until paid; together with plaintiff's costs and disbursements taxed at the sum of $429.27, with interest as aforesaid.

It is further ordered that execution do issue to enforce the collection of this judgment.

Dated November 16, 1912.

RICHARD E. SLOAN,
Judge.

[Endorsements]: No. 14. (27.) In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Original. Judgment. Filed Nov. 18, 1912, at 10 A. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy. L. Kearney, W. M. Seabury, Attorneys for Plaintiff.

United States of America,
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing is a true and complete judgment-roll in the case of Thomas P. Clark, Plain-

tiff, vs. Arizona & New Mexico Railroad Company, a corporation, Defendant, No. 14 in said [90] court.

Witness my hand and the seal of said court affixed this 18th day of November, A. D. 1912.

[Seal] ALLAN B. JAYNES,
Clerk.

[Endorsements]: #14. Thos. P. Clark, Plaintiff, vs. The Arizona & New Mexico Railway Company, a Corporation, Defendant. Judgment-roll. Filed Nov. 18, 1912. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy.

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[91] *In the United States District Court for the District of Arizona.*

No. 14.

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,
Defendant.

Transcript of the Minute Entries.

BE IT REMEMBERED, that heretofore and upon, to wit: the twenty-second day of April, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said Court, the following order, *inter alia* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Setting Case for Trial.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It is ordered that this case be set for trial on Tuesday, June 4, 1912, at 9:30 o'clock A. M. (1–160.)

AND AFTERWARDS, and upon, to wit, the 28th day of May, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Granting Leave to File Amended Answer.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

On application of Wm. C. McFarland, Esquire, counsel for the defendant herein, the defendant is granted leave to file an amended answer herein. (1–283.)

[92] AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and

entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Directing Entry of Mr. Seabury as Counsel for Plaintiff.]

14.

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,
Defendant.

On his application, it is ordered that Wm. M. Seabury, Esquire, be entered as counsel for the plaintiff herein. (1–284.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Directing that Certain Motions be Passed on Calendar.]

14.

THOMAS P. CLARK,
Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,
Defendant.

By consent of counsel for the respective parties hereto, it is ordered that the several motions of the defendant herein be passed upon the calendar to be

called up on at least five days' notice to the plaintiff. (1–284.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Vacating Order Setting Case for Trial, etc.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It is by the Court ordered that the order heretofore made setting this case for trial on June 4, 1912, be and the same is now, vacated; and it is further ordered that this case be passed on the calendar. (1–284.)

[93] AND AFTERWARDS, and upon, to wit, the 9th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Continuing Hearing of Motions to Strike.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It is ordered that the hearing of the motions of the defendant to strike out portions of the complaint herein, and to make the complaint herein more definite and certain, be continued until Monday, September 16, 1912, at 10 o'clock. (1–307.)

AND AFTERWARDS, and upon, to wit, the 16th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

[Order Directing Entry of Mr. Seabury as Associate Counsel for Plaintiff, and Submitting Motions to Strike, etc.]

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Upon motion of L. Kearney, Esquire, it is ordered that Wm. M. Seabury, Esquire, be entered as associate counsel for the plaintiff herein.

And now, this matter came on this day regularly to be heard upon the motion of the defendant to strike the amended complaint herein from the files, the motion to strike out portions of the amended complaint on the ground of duplicity [94] and the motion to make the amended complaint herein more definite and certain, L. Kearney, Esquire, and Wm. M. Seabury, Esquire, appearing as counsel for the plaintiff and McFarland & Hampton for the defendant. Argument of the respective counsel was had and said matters being fully submitted to the Court, the same were by the Court taken under advisement.

It is ordered that the demurrer of the defendant to the amended complaint herein be set for hearing on Tuesday, September 17, 1912, at 10:00 o'clock A. M. (1–315.)

AND AFTERWARDS, and upon, to wit, the 17th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Denying Motions to Strike, etc.; Overruling Demurrers to Amended Complaint.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

The several motions of the defendant having been heretofore argued and fully submitted to the Court and the Court being now fully advised in the premises, it is ordered that the motion to strike the amended complaint herein from the files be denied, that the motion to strike the amended complaint herein from the files on the ground of duplicity be denied, and that the motion to make the amended complaint herein more definite and certain be denied, to which ruling of the Court the defendant, through his counsel, excepts.

And now, this matter came on this day regularly to be heard upon the general and special demurrer of the defendant to the amended complaint herein, L. Kearney, Esquire, and Wm. M. Seabury, [95] Esquire, appearing as counsel for the plaintiff and W. C. McFarland, Esquire, for the defendant. Argument of the respective counsel was had and the matter being fully submitted to the Court and the Court being fully advised in the premises, it is ordered that the general demurrer to the amended

complaint herein be overruled; that the special demurrer set forth in paragraph II of the amended answer be overruled; that the special demurrer set forth in paragraph III of the amended answer be overruled; that the special demurrer set forth in paragraph V of the amended answer be overruled; that the special demurrer set forth in paragraph VI of the amended answer be overruled, to all of which rulings the defendant, through its counsel, excepts. (1–318.)

AND AFTERWARDS, and upon, to wit, the 7th day of October, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Setting Cause for Trial by Hearing.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It is ordered that this case be set for trial by jury on Thursday, November 7, 1912, at 10:00 o'clock A. M. (1–370.)

AND AFTERWARDS, and upon, to wit, the 11th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912,

term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[96] [Order Directing Opening of Depositions.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

By consent of counsel for the respective parties hereto, it is ordered that the depositions on file in the office of the Clerk be opened by said Clerk. (1–592.)

AND AFTERWARDS, and upon, to wit, the 12th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Minutes—November 12–16, 1912—Trial.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

This case came on this day regularly for trial, L. Kearney, Esquire, and Wm. M. Seabury, Esquire, appearing as counsel for the plaintiff, and W. C. McFarland, Esquire, as counsel for the defendant. Whereupon, on motion of W. C. McFarland, Esquire, it is ordered that Messrs. Kibbey & Bennett be entered as counsel for the defendant herein and both parties announce ready for trial. Whereupon, the Clerk was ordered to draw twenty names from the box wherein he had deposited in the presence of the Court the names of the jurors, summoned and not excused and the names of twenty persons were thereupon called, and all answering thereto, respectively, took their places in the jury-box. The said jurors were then duly sworn and examined on their *voir dire*. E. H. Channell was thereupon challenged and excused for cause and the Clerk then drew from the box the name of Henry Hilbers, who was duly sworn and examined on his *voir dire*. The panel being now full and complete, and said jurors in the jury-box having been passed for cause by both the prosecution and the [97] defense, the respective parties exercised their right of peremptory challenge, and the following named persons were called according to law to constitute the jury, viz.: R. H. Brooks, T. J. Smith, J. Thos. Bowles, J. B. Dills, S. C. Kleck, Kirby S. Townsend, W. J. Osborn, Smith Chittick, Jno. W. Hagerlund, J. E. McClain, Herbert L. Ritter and Henry Hilbers, who were duly sworn to well and truly try the issues joined between the plaintiff and the defendant herein. Counsel for the plaintiff then read the complaint to the jury, and

made a statement of the plaintiff's case to the jury. Counsel for the defendant then read the answer to the jury and made a statement of the defendant's case to the jury. The plaintiff then, to maintain upon his part the issues herein, introduced certain written testimony, being the depositions of J. C. Gatti, Rebecca Manes, Ross Thomas, W. A. Parker, G. L. Coffee and E. T. Martin, and also introduced certain documentary evidence, and this being the usual hour of recess, the Court duly admonished the jury according to law, and thereupon excused them until Wednesday, November 13, 1912, at 9:30 o'clock A. M., to which time the further trial of this case is now ordered continued. (1–595.)

AND AFTERWARDS, and upon, to wit, the 13th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court, in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

[98] This case having been continued from yesterday's session of this court, come now the same parties hereto, and come also the jurors herein, their

names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, introduced certain written testimony, to wit, the depositions of John Freeman, H. B. Burk, T. J. St. Thomas, and also called as witnesses the following named persons, to wit: Jeff Dunegan, C. A. Davidson, Henry Doran, G. F. Chambers, Thos. P. Clark, the plaintiff and Dr. Louis Dysart, who were duly sworn, examined and cross-examined, and this being the usual hour of recess, the Court duly admonished the jury according to law, and thereupon excused them until Thursday, November 14, 1912, at 9:30 o'clock A. M. to which time the further trial of this case is now ordered continued. (1–598.)

AND AFTERWARDS, and upon to wit: the 14th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILROAD COMPANY, a Corporation.

This case having been continued from yesterday's session of this court, come now the same parties

hereto, and come also the jurors herein, their names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, called as witnesses the following [99] named persons, to wit: Robert L. Brownfield, R. W. Craig, and Mrs. Mary Josephine Clark, who were duly sworn, examined and cross-examined and also called as a witness A. T. Thompson, former traffic manager of the defendant company, who was duly sworn and cross-examined according to law and thereupon the plaintiff rested his case. The defendant then, through its counsel moved the Court to direct the jury to return a verdict for the defendant, which motion was by the Court denied. The defendant then, to maintain upon its part the issues herein, called as witnesses R. C. Bond and E. M. Cline, who were duly sworn, examined and cross-examined and also introduced certain documentary evidence and this being the usual hour of recess, the Court duly admonished the jury according to law, and thereupon excused them until Friday, November 15, 1912, at 9:30 o'clock A. M., to which time the further trial of this case is now ordered continued. (1–599.)

AND AFTERWARDS, and upon, to wit, the 15th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

This case having been continued from yesterday's session of this court, come now the same parties hereto, and come also the jurors herein, their names are called and all answering [100] thereto, respectively, the further trial of the case proceeds as follows: The defendant, to further maintain upon his part the issues herein, recalled as witnesses E. M. Cline, R. C. Bond, and A. T. Thompson, who were further examined and cross-examined, and also called as witnesses the following named persons, to wit: J. T. Kelly, J. G. Lindsay, Ingraham T. Sparks, Paul Reisinger, Dr. H. H. Stark and E. Dawson, who were duly sworn, examined and cross-examined and also introduced certain written testimony, being the deposition of Dr. Henry Dietrich, and thereupon the defendant rested its case. The plaintiff then, in rebuttal, recalled as a witness Thos. P. Clark, the plaintiff, who was further examined and cross-examined, and thereupon the plaintiff rested his case. There being no further testimony offered on either side and the evidence being closed, argument of the respective counsel was had and this being the usual hour of recess, the Court duly admonished the jury according

to law and thereupon excused them until Saturday, November 16, 1912, at 9:00 o'clock A. M., to which time the further trial of this case is now ordered continued. (2–2.)

AND AFTERWARDS, and upon, to wit, the 16th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

[101] This case having been continued from yesterday's session of this court, come now the same parties hereto and come also the jurors herein, their names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: Further argument of the respective counsel was had and the Court instructed the jury orally, the charge being taken down in shorthand by Jos. S. Jenckes, a phonographic reporter in attendance upon the trial. And said case being now fully submitted, said jury retire in charge of Forest W. Hill and Frank Martinez, bailiffs, officers of this court, first

duly sworn for that purpose, to consider of their verdict. (2–4.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

This cause having been continued from a previous session of the present term of this court on this day, come now the same parties hereto, and come also the jurors herein, in charge of their bailiffs, sworn for that purpose, their names are called and all answering thereto, respectively, upon being asked if they have agreed upon a verdict, through their foreman, report that they have agreed and thereupon, through their foreman, present their verdict. Whereupon said verdict was ordered recorded as follows, to wit:

"No. 14.

THOMAS P. CLARK,

Plaintiff,

against

THE ARIZONA & NEW MEXICO [102] RAILROAD COMPANY, a Corporation.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, and assess his damages at Twelve Thousand Six Hundred Seventy-five 00/100 Dollars ($12,675).

J. E. McCLAIN, Foreman."

And the clerk, inquiring of said jurors whether such is their verdict, they say that it is, and so say they all. Whereupon it is ordered that said jury be discharged from the case. It is further ordered that judgment be entered herein in favor of the plaintiff and against the defendant in accordance with said verdict. (2–9.)

AND AFTERWARDS, and upon, to wit, the 22d day of November, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term, of said court, the following order, *inter alia,* was had and entered of record in said court, in said cause, which said order is in words and figures, as follows, to wit:

[Order Granting Ten Days to Prepare and File Bill of Exceptions.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

Upon application of W. C. McFarland, Esquire, and Messrs. Kibbey & Bennett, counsel for the defendant herein, it is ordered that the said defendant be granted ten days in addition to the time allowed by rule of Court in which to prepare and file a bill of exceptions herein. (2–20.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[103] [Order Granting Stay of Execution for Forty-two Days from November 18, 1912.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

Upon application of W. C. McFarland, Esquire, and Messrs. Kibbey & Bennett, counsel for the defendant herein, it is ordered that the defendant be granted a stay of execution for forty-two days from November 18, 1912, upon filing a bond in the sum of Five Thousand Dollars ($5,000) within ten days from this date. (2–20.)

AND AFTERWARDS, and upon, to wit, the 28th day of December, A. D. 1912, the same being one of the regular juridical days of the October, 1912 term of said court, the following order, *inter alia,* was had

and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Fixing January 2, 1913, as Time for Settling Bill of Exceptions.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It is by the Court ordered that Thursday, January 2, 1913, be and the same is hereby fixed as the time for settling the bill of exceptions in this case. (2–76.)

AND AFTERWARDS, and upon, to wit, the 2d day of January, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term of said court, the following order *inter alia* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

[104] Be it remembered that heretofore, to wit, on the 27th day of December, 1912, the same being a regular juridical day of the October, 1912 term of the United States District Court for the District of Arizona, the defendant in the above-entitled cause, the Arizona & New Mexico Railway Company, filed in said court its petition and motion in writing for a new trial of said cause, which said motion and petition is in words and figures following, that is to say:

"In the District Court of the United States for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Petition for a New Trial.

"Comes now the Arizona & New Mexico Railway Company, the defendant in the above-entitled cause, and prays the Court to grant it a new trial of this cause, and for grounds thereof respectfully represents:

I.

"Because the Court erred in overruling defendant's general demurrer to plaintiff's second amended complaint.

II.

"Because the Court erred in overruling defend-

ant's special demurrers to plaintiff's second amended complaint.

III.

"Because the Court erred in overruling defendant's motion to make said second amended complaint more definite and certain.

[105] IV.

"Because the Court erred in overruling defendant's motion to strike on the grounds of duplicity.

V.

"Because the Court erred in overruling defendant's objections at the beginning of the trial to the admission of any evidence in the case, on the ground that the amended complaint, and neither point therein, alleged facts sufficient to constitute a cause of action.

VI.

"Because the Court erred in denying defendant's motion made at the close of the plaintiff's evidence for a directed verdict for the defendant for the reason that the causes of action, if any, of plaintiff, as alleged in the first and second counts of his said amended complaint, are based upon the first section of the 'Employer's Liability Act,' approved April 22d, 1908, in respect to injuries received by employees while engaged in interstate commerce, and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce at the time of the alleged injuries. The undisputed evidence in the cause shows that plaintiff and defendant are engaged, at the date

of the alleged action, in switching cars at its railroad yards at Clifton.

VII.

"Because the Court erred in sustaining plaintiff's objections to and excluding the testimony of witness [106] Kelly, offered by defendant, by whom defendant proposed to show that the conduct of plaintiff on several occasions for two years previous to the date of the alleged accident was habitually and continuously negligent in observing signals given him while operating his engine in switching cars in the yards of the defendant; and the further objection of plaintiff that in many instances which occurred almost daily within two years previous to the happening of this accident, he had uniformly and habitually disobeyed signals given to him as engineer in the operating of his engine while switching in the yards of the defendant.

VIII.

"Because the Court erred in sustaining the objections of plaintiff to and excluding the testimony of witness Kline offered by defendant, by whom defendant proposed to show that the conduct of plaintiff on several occasions for two years previous to the date of the alleged accident was habitually and continuously negligent in observing signals given him while operating his engine in switching cars in the yards of the defendant; and the further objection of plaintiff that in many instances which occurred almost daily within two years previous to the happening of this accident he had uniformly and habitually disobeyed signals given to him as engineer in

the operation of his engine while switching in the yards of the defendant.

IX.

"Because the Court erred in that part of its charge in reference to the rule of the assumption of the risk in [107] limiting the assumption of risk by the employee to defects in works, or dangerous conditions, and excluding therefrom the obvious risks of dangerous operation, and excepting from the assumption of the risk the risk of danger arising in whole or in part from the negligence of any officer, agent or employee of the defendant, and because said instructions imposed the burden of proof upon the defendant that the danger, if any, was one of those which the law declares the plaintiff to have assumed.

X.

"Because the Court erred in that part of its charge in reference to the rule of damages in stating that, 'If the plaintiff is guilty of contributory negligence and his negligence and that of the defendant company are equal, the jury will then give an award of one-half of the damages it would have given if he had been free from negligence; but if he be twice as negligent as the defendant company, then a third will be the proportion of the damages he will receive, and so on, whatever the proportion may be.'

XI.

"Because the Court erred in that part of its charge on the subject of damages, because the same is a comment upon the weight of the evidence.

XII.

"Because the Court erred in instructing the jury

that the negligence of the plaintiff, in order to exempt the defendant from liability, must have been gross, so wilful, [108] and extended to such an extent that the jury may say that it was the proximate and direct cause of the injury.

XIII.

"Because the Court erred in instructing the jury that the omission of the plaintiff to obey a signal given him to stop, by prompt obedience of which he might have stopped and averted the injury, must be wilful and intentional to exempt the defendant from liability for the alleged injury.

XIV.

"Because the Court erred in sustaining plaintiff's objections to the testimony of Dr. Stark, a witness offered by defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received at the date of the accident, and particularly as to the condition of the plaintiff's eye, about two months subsequent to the date of the alleged injuries, it not having been shown that the relation of physician and patient existed between the witness and the plaintiff at the time.

XV.

"Because the Court erred in refusing to give to the jury instructions offered by the defendant.

XVI.

"Because the Court further erred in that part of its charge wherein it instructed the jury that in order to relieve the defendant from liability on account of negligence, that the negligent conduct of the plaintiff must be wilful and wanton.

[109] XVII.

"Because the damages assessed by the jury are excessive.

XVIII.

"Because the evidence at the trial was insufficient to justify the verdict of the jury.

XIX.

"That the verdict of the jury is against the law.

XX.

"Because the Court erred in excluding the testimony of Dr. Dietrick, whose deposition was offered in evidence, for the reason that the objections urged by plaintiff on the ground that it was privileged, were waived by the plaintiff by filing cross-interrogatories to be propounded by said witness.

XXI.

"Because the Court erred in sustaining plaintiff's objection to the testimony of the witness, J. G. Lindsay. Defendant offered to prove by said witness the mode generally adopted by prudent railway men in switching their cars under like circumstances to be the same as adopted by the defendant in this case.

McFARLAND & HAMPTON,
KIBBEY, BENNETT & BENNETT,
Attorneys for Defendant."

[Order Overruling and Denying Petition and Motion for a New Trial, etc.]

And be it further remembered that thereafter, to wit, on the 2d day of January, 1913, the same being a regular juridical day of said court, said petition and motion duly and regularly came on to be heard

by said Court, and the [110] Court being advised in the premises, then and there and thereupon overruled and denied said petition and motion for a new trial, and refused to grant the defendant a new trial of said cause, to which ruling of the Court in denying said petition and motion for a new trial the defendant then and there in open court excepted. And now the defendant, at the time of making said ruling of the Court denying said petition and motion for a new trial, reduced its bill of exceptions to writing and asks that it may be settled and signed by the Judge of said court as its bill of exceptions, which is now accordingly done in open court this 2d day of January, 1913. (2–86.)

AND AFTERWARDS, and upon, to wit, the 8th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

[Order Fixing Amount of Bond.]

This matter came on this day regularly to be heard upon the application of the defendant for an order

fixing a supersedeas bond upon a writ of error herein. W. C. McFarland and Joseph H. Kibbey, Esquires, appearing as counsel for the defendant, and this matter being fully submitted to the Court and the Court being fully advised in the premises, orders that said bond be fixed at the sum of twenty thousand dollars ($20,000.00). (2–132.)

[111] AND AFTERWARDS, and upon, to wit, the 24th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

[Order Allowing Writ of Error, etc.]

This matter came on this day regularly to be heard upon the petition of the defendant for a writ of error herein, Joseph H. Kibbey, Esquire, and W. C. McFarland, Esquire, appearing for the defendant and Wm. M. Seabury, Esquire, as counsel for the plaintiff. Whereupon, William M. Seabury, Esquire, counsel for the plaintiff, objected to the allowance of the petition, for the reason that the appeal was

not taken as prescribed by law, which objection was by the Court overruled, to which ruling the plaintiff, through his counsel, excepts. And now, on the consideration of said petition, the Court does allow the writ of error upon defendant giving bond according to law in the sum of Twenty Thousand Dollars ($20,000.00), which shall operate as a supersedeas bond in accordance with the written order allowing said writ signed and filed herein. (2–144.)

AND AFTERWARDS, and upon, to wit, the 27th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912 term of said court, the following order, *inter alia,* was had and entered of record in said [112] court in said cause, which said order is in words and figures as follows, to wit:

[Order Respecting Original Exhibits.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It appearing to the Court that in preparing the transcript of the record on appeal it will be impracticable for the Clerk to make copies of the exhibits on file herein, the same consisting of photographs and tracings, it is ordered that the Clerk include the original exhibits in this case in the transcript of the rec-

ord and that in making a transcript of the bill of exceptions, where copies of the original exhibits are made a part of said bill of exceptions, a reference to the original exhibits on file shall be made by the Clerk in lieu of making copies of said exhibits. (2–151.)

(For Order Allowing Bill of Exceptions, see Minute Entry of January 2, 1913.)

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[113] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that on the 12th day of November, A. D. 1912, at a regular and stated term of the United States District Court for the District of Arizona, the same being one of the regular judicial days of the October term of said court, 1912, begun and holden in the city of Phoenix, Arizona, before his Honor, Richard E. Sloan, District Judge, the issues joined by the pleadings in said cause came on to be tried by the said Judge and a jury empaneled and sworn to try the issues in said cause. The plaintiff was represented by L. Kearney and W. M. Seabury, his attorneys, and the defendant by W. L. Mc-

Farland, John R. Hampton, Joseph H. Kibbey and Walter Bennett, its attorneys.

To sustain the issues on his part, the plaintiff offered in evidence the deposition of one John C. Gatti, to the introduction of said deposition of said Gatti as evidence, or to the introduction of any evidence on the part of plaintiff, defendant objected for the following reasons, to wit:

[114] [Objections to Introduction of Any Evidence.]

Mr. McFARLAND.—Now, if the Court please, the defendant objects to the introduction of any evidence in this cause, for the reason that the facts stated in the first count of plaintiff's second amended complaint does not state facts sufficient to constitute a cause of action. It is not alleged in said count that the plaintiff did not know of the defective and unsafe condition of the defendant's roadbed, at or near the place of said accident and injury is alleged to have occurred, nor is it alleged in said first count that the defendant could not have known by the exercise of ordinary care of said defective and unsafe condition of said roadbed at or near the place of said accident or injury is alleged to have occurred. That no right of action arises in favor of the employee at all under the terms of the employment. The employer violates no legal duty to the employee in failing to protect him from the dangers the risk of which he agreed expressly or impliedly to assume. We desire to urge this same objection to the second count of the complaint and ask that this objection be in-

corporated in the record to the second count also, and a further objection to any evidence on the second count in the second amended complaint, for the reason that no facts are alleged showing any acts or omissions on the part of the defendant, its agents, officers or servants, that caused or proximately contributed to the injuries complained of.

Said objections by defendant to said deposition and introduction of the testimony of said Gatti were by the Court [115] overruled, to which action of the Court the defendant then and there excepted and still excepts.

And thereupon time was given to defendant as hereinafter stated within which to prepare and file this bill of exceptions.

Be it further remembered that thereupon the plaintiff introduced the following evidence in said cause, that is to say:

[Proceedings Had Tuesday, November 12, 1912.]

Tuesday, November 12th, 1912.

At nine-thirty o'clock A. M. this day, this being the time heretofore fixed by the Court for the trial of this case, comes the plaintiff in person and by his attorneys, Messrs. Kearney and Seabury, and the defendant by its attorneys, Messrs. McFarland and Kibbey & Bennett, also comes, and a jury of twelve men, being first duly selected and tried, empaneled and sworn to well and truly try the matter at issue herein, and the complaint and answer being read to the jury by counsel, thereupon the following further proceedings are had herein, to wit:

Mr. SEABURY.—May we ask counsel for the defendants if there is going to be any denial of the corporate capacity of the defendant? The pleadings deny every allegation.

Mr. McFARLAND.—It is admitted.

Mr. SEABURY.—Does that concession also include the proof that the defendant was a common carrier on the 15th day of March, 1911, and is now?

Mr. BENNETT.—I think that is a matter of law.

[116] Mr. SEABURY.—I ask if it may be conceded as a matter of fact.

The COURT.—Is the issue specially joined as to that?

Mr. SEABURY.—I think so. They deny every allegation in the complaint.

The COURT.—I think a general denial is insufficient to put in issue the corporate capacity of the defendants.

Mr. SEABURY.—But is it sufficient to raise the issue as to how the corporation is engaged—in what business? I thought it would be safer, and it certainly would save time, to get a concession that the defendant is a corporation and was engaged as a common carrier in interstate commerce on the 15th day of March, 1911.

Mr. McFARLAND.—We have no objection to admitting that it is engaged in interstate commerce and that it is a common carrier, but whether it was engaged in interstate commerce at the time of this accident, that is a different proposition.

The COURT.—You admit, then, that it is an interstate commerce road?

Mr. McFARLAND.—Yes.

The COURT.—But you don't admit it as to this particular case.

Mr. McFARLAND.—No.

Mr. SEABURY.—But there is no dispute that it was engaged on the 15th of March, 1911, in interstate commerce?

Mr. KIBBEY.—We admit this road was at that time engaged [117] in interstate commerce, except as that may be applicable to the particular transaction.

Mr. SEABURY.—That gives us a concession of the corporate capacity, that they are a common carrier, and that on the 15th day of March, 1911, they were engaged in interstate commerce.

Mr. KIBBEY.—Except as to this particular transaction.

The COURT.—It is disputed that the plaintiff was engaged in the act of interstate commerce?

Mr. McFARLAND.—At this particular time and place. We do not concede that.

Mr. SEABURY.—I understand that. Now, if it please the Court, we desire to offer in evidence the depositions of J. C. Gatti, Mrs. Manes, Ross Thomas, W. H. Parker, Charles Davidson and G. L. Coffey, pursuant to notice dated March 8th, 1912.

Mr. KIBBEY.—I understand one of those parties is here. If he is, of course we object to his deposition.

Mr. SEABURY.—Which one?

Mr. KIBBEY.—Mr. Davidson.

Mr. SEABURY.—Very well; then we won't read his deposition. Now, we will read the deposition of J. C. Gatti.

Mr. McFARLAND.—Now, if the Court please, the defendant objects to the introduction of any evidence in this cause, for the reason that the facts stated in the first count of plaintiff's second amended complaint does not state facts sufficient to constitute a cause of action. It is not alleged in said count that the plaintiff did not know of the defective [118] and unsafe condition of defendant's roadbed, at or near the place of said accident and injury is alleged to have occurred, nor is it alleged in said first count that the defendant could not have known by the exercise of ordinary care of said defective and unsafe condition of said roadbed at or near the place of said accident or injury is alleged to have occurred. That no right of action arises in favor of the employee at all under the terms of the employment. The employer violates no legal duty to the employee in failing to protect him from the dangers the risk of which he agreed expressly or impliedly to assume. We desire to urge this same objection to the second count on the complaint and ask that this objection be incorporated in the record to the second count also, and a further objection to any evidence on the second count in the second amended complaint, for the reason that no facts are alleged showing any acts or omissions on the part of the defendant, its agents, officers or servants, that caused or proximately contributed to the injuries complained of.

The COURT.—I think these matters were dis-

cussed to some extent in the argument on the demurrer. The objections will be overruled.

Mr. KIBBEY.—What will be the rule about exceptions? The rule provides that exception is to be taken down and [119] noted at the time.

The COURT.—A stenographer is present and I think an exception may be made and noted by the stenographer whenever taken, and that will be sufficient.

Mr. McFARLAND.—Your Honor will have our exception noted to the ruling in this instance.

Mr. SEABURY.—Do I understand that the exception must be taken in accordance with the established practice?

The COURT.—Yes, indeed, I think that ought to be the practice.

Thereupon plaintiff's counsel reads to the Court and jury the depositions of J. C. Gatti, Rebecca Manes, Ross Thomas, W. H. Parker, G. L. Coffey, and at the conclusion of the reading of the deposition of Coffey, Mr. Seabury says:

Mr. SEABURY.—With your Honor's permission we would like to offer in evidence certain photographs of this track. There are two of them. I think the sooner they go in the better in order that the Court and jury may better understand the location of this accident.

Mr. KIBBEY.—When were they taken?

Mr. SEABURY.—I think in March—March 11th, 1912.

Mr. KIBBEY.—About a year after the accident?

Mr. SEABURY.—Yes.

Mr. KIBBEY.—(After examining photographs.) We have no objection to them.

[120] Mr. SEABURY.—We offer in evidence two photographs which purport to show substantially the condition of the track at the place of the injury at the time of the accident, and understand they are received without objection.

Mr. KIBBEY.—But they are not as they were at the time of the accident. They were taken a year later.

Mr. SEABURY.—I say substantially.

Mr. KIBBEY.—No objection that they are photographs of the scene of the accident as it was taken on the 12th of March, 1912.

(Thereupon the photographs in question are received in evidence and marked by the Clerk, Plaintiff's Exhibits One and Two.)

After which the deposition of E. T. Morton is read to the Court and jury by plaintiff's counsel, until conclusion, and the hour of four-thirty arriving, the Court thereupon takes a recess until nine-thirty A. M., Wednesday, November 13th, 1912, and the jury is admonished by the Court not to let anyone talk to them about the case, or to talk about it among themselves, and are permitted to separate during the recess.

Wednesday, November 13th, 1912.

At nine-thirty this day, the plaintiff being present in person and represented by his counsel, and the defendant being present by its counsel, thereupon the following further proceedings are had herein, to wit:

[121] The jurors come into court and are called by the clerk, all answering to their names.

Mr. SEABURY.—The plaintiff offers the deposition of John Freeman which appears to have been taken on the 23d of May, 1912.

Thereupon the deposition is read to the Court and jury by plaintiff's counsel, and at the conclusion plaintiff's counsel offers and reads to the Court and jury the depositions of H. B. Burk and T. J. St. Thomas.

[Recital Concerning Objections Taken to Certain Depositions, etc.]

(During the reading of the several depositions, many of the objections taken at the time of the taking of the depositions were urged and were thereupon passed upon by the Court, some of them after considerable discussion between the Court and counsel. Such objections, rulings and discussions, athough taken down by the reporter at the time, have not been transcribed, defendant's counsel, who ordered the transcript, requesting that it be not done.)

[Testimony of J. F. Dunagan, for Plaintiff.]

J. F. DUNAGAN, being called as a witness on behalf of the plaintiff, and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, please?

A. Jeff Dunigan.

Q. What is your occupation?

A. Well, I haven't any at the present.

(Testimony of J. F. Dunagan.)

Q. What was your occupation in March 15th, 1911?

A. I was in the saloon business.

Q. Whereabouts? A. At Clifton, Arizona.

[122] Q. Whereabouts is your place located in Clifton?

A. It is what is known as Chase Creek.

Q. How near is that to the railroad track at Clifton?

A. Well, my place of business is about one hundred and fifty yards from the track that went up to the roundhouse—I judge about that far from the roundhouse.

Q. What part of the track would you say you were nearest to with reference to the Shannon switch?

A. Well, my place of business is not anywhere near the Shannon switch.

Q. Well, is it north or south of the Shannon switch?

A. Well, it is north—no—yes, it is north.

Q. In a southerly direction?

A. Yes, a southerly direction. There is a curve after you leave the depot that goes up Chase Creek.

Q. Tell us whether you knew Mr. Clark, the plaintiff in this action, in March, 1911.

A. Yes, sir.

Q. How long had you known him prior to that?

A. I guess ten or eleven years. I don't know exactly.

Q. You knew how he was engaged at that time?

A. Yes, sir.

Q. He was an engineer on the defendant's rail-

(Testimony of J. F. Dunagan.)

road, was he not? A. Yes, sir.

Q. Now, please tell us what you saw take place about March 15th, 1911, with reference to this collision that has been described here.

A. What do you want me to do? Just make a statement?

Q. Yes, the way you saw it.

[123] A. Well, I live on what is known as the addition—the flat—Hill Addition. They set their trains out there quite often and I steal a ride if they went up to my place of business, and I come up on this string of cars this day. I don't know the exact date—sometime in March, 1911, and they stopped the train before they got to the Shannon switch, and I seen what they were going to do—cut off four cars, I think—and made the Shannon hill. I goes over to the Shannon store. They had just come back with the engine to pick up the other cut, and I thought they were going up to town with it, but they didn't; they cut loose and started for the Shannon hill again. Then I walked down between the tracks—there is a picture show there between the main line—in this direction (indicating on photograph).

Q. That would be the west side of the main track?

A. Yes, between the Shannon track and the main line. Now, I wasn't expecting anything, and when I heard the lick I seen Mr. Kline cut the cars from the ground and walk across the track to the Shannon track that goes up this Shannon hill here. That is about all I know. They hit and I ran down there.

Q. You saw the collision? A. Yes, sir.

(Testimony of J. F. Dunagan.)

Q. Do you know Kline? A. Yes, sir.

Q. Have you known him for some time?

[124] A. Ever since he came there—eight or nine years.

Q. Was he the man that cut the cars off from the engine? A. Yes, sir.

Q. Did you see him do it?

A. Not from the engine. He cut the four cars.

Q. He cut off four cars?

A. I don't know how many he cut, but he cut the cars off.

Q. He cut off certain cars that Clark's engine took to shift up Shannon hill? A. Yes, sir.

Q. He left at least four cars? A. Yes, sir.

Q. What, if anything, did you see Kline do after that?

A. I seen him cross the track—over to the Shannon track to the cars that Mr. Clark was pushing up the hill.

Q. Did you see him do anything with reference to any of the brakes on that car? A. I did not.

Q. Who else did you see on those cars, if anyone?

A. There wasn't anyone else on the cars.

Q. That is the cars left stationary?

A. No one on them at all, except me—I got off.

Q. I ask you whether or not those four cars were at a standstill when you got off of them?

A. They were stopped still.

Q. Dead still?

A. Stopped still—he had to stop still to get the slack [125] to cut the train and pull the pin.

(Testimony of J. F. Dunagan.)

Q. When you got off had the engine been removed from the car you got off of yet?

A. Well, I wasn't on the cars the engine had hold of. I was on the back end of the four cars left stationary.

Q. Didn't the engine bring those down?

A. His engine carried the cut that was cut to him and left these four standing that I got off of.

Q. Now, at the time you got off the car, Mr. Clark's engine wasn't attached to the train, was it?

A. No.

Q. It had already been cut?

A. Cut loose; yes.

Q. You say the car was stationary at the time you got off?

A. Yes, the train was stopped and the cars cut loose.

Q. Was Mr. Clark's cars going on down the main line to be switched up the Shannon switch when you got off? A. Yes, sir, going right on down.

Q. It was going down in a southerly direction?

A. No, it wasn't a southerly direction—northerly direction.

Q. Northerly, I should say. Did you see or recognize any of the men on those cars attached to Mr. Clark's engine?

A. I did after the collision—after they struck.

Q. Who did you see?

A. There were several there.

Q. Do you remember seeing St. Thomas?

(Testimony of J. F. Dunagan.)

[126] A. St. Thomas?

Q. Yes. A. I do.

Q Do you know him? A. Yes, sir.

Q. Do you remember seeing anyone else—Mr. Kline?

A. I seen Mr. Kline, Mr. Clark, and the fireman, Mr. Chambers.

Q. Was Kelley there too?

A. I couldn't say, he could have been.

Q. He may have been for all you know?

A. Yes, there could have been several more there.

Q. Tell us, please, what you saw with reference to Mr. Clark. I understand you to say you ran up there?

A. Well, by the time I got there they had him off the engine, or he got off—I don't know how he got off. They were holding him, I think.

Q. Who was holding him, do you recollect?

A. I think Mr. Gatti was one, and maybe one of the train crew and fireman. He was complaining some—had a little blood in his face—a good deal of dirt on him—coal and stuff. I asked him if he was hurt bad. He said he didn't know how bad, he said, I am mashed up in my hip or back—complained of his hip or back. That is about all he said, and they took him on.

Q. What was his general appearance?

A. His appearance was that he was hurt—I thought [127] he was hurt bad. I thought he was killed—he was mashed all to pieces—the way the cab was in.

(Testimony of J. F. Dunagan.)

Q. What was the condition of the cab?

A. It was mashed in.

Q. Did you see any splinters in there?

A. Yes, I think it was chinking out of the car probably. I didn't pay much attention to it.

Q. When you came up there you were on the west side of the main track?

A. I crawled over to get around between the first car and his engine.

Q. You came through it?

A. Yes, came through it.

Q. That left you on the west side of the Shannon switch? A. Yes, sir.

Q. That is where you found the plaintiff after the accident? A. Yes, sir.

Q. Do you know on what side of the engine-cab Mr. Clark was sitting when he was taking these cars down the main line?

A. He was on the right side.

Q. Do you know whether the position changed when he began to move those cars back up the Shannon switch?

A. I know his position would not— In what way? Would he get on the other side of the engine?

Q. I am asking you. Did he?

A. I wouldn't think so.

Q. Do you remember what kind of a car it was that was [128] immediately next to his engine tender? A. It was a box-car.

Q. By box-car what kind of a car do you mean?

A. I mean a box-car—it could have been a stock-

(Testimony of J. F. Dunagan.)

car. It wasn't a flat car.

Q. That is what I mean. It was not a flat car—it was a top car?

A. Yes, sir, it had a top.

Q. Could you see well enough to say whether Mr. Clark from his position in the engine-cab could see these four cars approaching down the main line?

A. Well, I couldn't say. He couldn't see them the length of his string of cars. If he was on a line he might have seen them after his cars took Shannon switch and got within a car length—he might have seen them—but he couldn't see them pushing four cars until they cleared into Shannon switch.

Q. Now, if his entire cars, including the engine, had cleared into Shannon switch, he would not have been hit? A. No, sir.

Q. So, isn't it a fact he didn't get clear of Shannon switch at the time of the accident?

A. It certainly is a fact that he didn't get clear.

Q. So you don't think he could see the approaching cars?

[129] Mr. KIBBEY.—It seems to us that this is all very leading.

The COURT.—Yes, it is. I sustain the objection.

(By Mr. SEABURY.)

Q. Do you know, as a matter of fact, Mr. Dunagan, whether Kline did set the brakes on those remaining cars, or did not set them?

A. That I couldn't say.

Q. Couldn't you say whether you know or not

(Testimony of J. F. Dunagan.)

whether he did so?

A. Well, he could have set them before I got on the train so far as that is concerned.

Q. He could? A. He could have done so.

Q. But he didn't do it afterwards?

A. Not while I was riding on it.

Q. Do you know whether he blocked the cars with sticks or stones? A. No, I don't.

Q. You saw him cross the track?

A. I saw him leave the car when he cut the train.

Q. Without doing any of those acts?

A. Yes. He could have set the brakes before he got up there so far as I know.

Q. You know as a matter of fact, too, that if those brakes had been set the cars could not have rolled?

Mr. KIBBEY.—We object to the question.

The COURT.—Yes, I think he has not shown his competency [130] in that respect.

(By Mr. SEABURY.)

Q. Have you ever been engaged in railroad work?

A. Some; yes, sir.

Q. When and for how long?

A. I worked for the A. & N. M. people when the road was a narrow gauge, and I switched a while for the S. P. Company and made a few trips braking. Something near a year I was with the Southern Pacific people.

Q. As brakeman? A. Yes, sir, and switchman.

Q. For about a year? A. Pretty near a year.

Mr. SEABURY.—Now, we ask the same question, if your Honor please.

(Testimony of J. F. Dunagan.)

Mr. McFARLAND.—I think he is not qualified.

The COURT.—I think he has shown experience. He may answer the question.

(Thereupon the reporter reads the following question:)

Q. You know as a matter of fact, too, that if those brakes had been set the cars could not have rolled?

Mr. KIBBEY.—We object further to the question on the ground that it is leading and suggestive.

Mr. SEABURY.—I will change the form in order to avoid the objection.

(To the witness.)

Q. Mr. Dunagan, do you know from your experience as a [131] railroad man whether or not these particular cars would or could have moved if the brakes on them had been set by Kline?

A. Why, no, they would not have moved, if the brakes had been set. Certainly not.

Mr. SEABURY.—That is all.

(By Mr. KIBBEY.)

Q. Where did you get on the train?

A. I got on at the flat.

Q. On the other side of the river?

A. On the south side of the bridge.

Q. And the cars stopped across the bridge?

A. After they crossed. I don't think all the train crossed—it might have. Any way, I got off when they made the first cut.

Q. Then you went to the Shannon store?

A. The Shannon store is fifty or sixty feet from the track, I guess.

(Testimony of J. F. Dunagan.)

Mr. KIBBEY.—That is all.

The COURT.—We will take a recess until half-past one o'clock. The jury will bear in mind not to speak about the case to anyone or to let anyone talk to you about it. (Thereupon the Court takes a recess.)

At one-thirty P. M., the parties being present, the plaintiff in person and by his counsel, and the defendant by its counsel, the jurors come into court and are called by the Clerk, all answering, and thereupon the following [132] further proceedings are had herein, to wit:

[Testimony of C. A. Davidson, for Plaintiff.]

C. A. DAVIDSON, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Mr. Davidson?

A. C. A. Davidson.

Q What is your business, Mr. Davidson?

A. Clerk now in a grocery—butcher business.

Q. What was your occupation in March, 1911?

A. Butcher—meat clerk.

Q. Whereabouts?

A. In Mr. Gaddi's shop at Clifton.

Q. How near is Mr. Gaddi's shop to the railroad track at Clifton?

A. Twelve feet—something like that—from the track.

(Testimony of C. A. Davidson.)

Q. About twelve feet? A. Yes, sir.

Q. Is that the railroad track that is the main line a few hundred feet south of the Shannon switch?

A. Yes, sir.

Q. Which side of the track is Mr. Gaddi's shop—the east or west side of the track—do you remember?

A. It is the east side.

[133] Q. Now, please tell us what you saw take place on the 15th day of March, 1911, at that place.

A. Well, I am in the habit of stepping out there and watching the switching crew making the hill there. They often back their loaded cars up in front of the shop and break the crossing—the road crossing—just below the butcher shop. I have been in the habit of standing out in front there watching them do this switching and making the hill with those loaded cars. Oftentimes they don't make the hill. Well, this morning I was out there. There were eight cars, I think, standing in front of the shop and they backed down—brought them down across the road crossing and stopped and uncoupled four and started off towards town. And immediately after they started off, the four that they had left there followed slowly, and to make sure that they were following I looked at the wheels and could see the bright part of the wheel moving. They went past the switch—the engine and the other four cars—and around the bluff, and I thought to myself, they will make it back before these four cars that was making after them would catch them at the switch. So they came around pretty fast, and right opposite

(Testimony of C. A. Davidson.)

the cars—the brakeman was sitting on the loaded cars going up the hill—and he made a motion and at that the train slacked up at once, and it wasn't long before I could see the front car of these four that followed them swing. So just as they were going to hit I hollered to Mr. Gatti and two or three others in the shop [134] to come out and watch the cars—they were going into a collision, I thought. Just as they came out the cars had done hit, and just about that time the whistle began to whistle like, and Mr. Gaddi ran down. I couldn't see anybody was hurt or anything of that kind. That is about all I saw of that part of it.

Q. Was there anybody in charge of the cars that began to roll by themselves? A. No, sir.

Q. Did you see anybody there at all with them?

A. Nobody there after that—after the engine and the other four cars left.

Q. Did you see the engine and the four cars attached to it cut off from the cars that subsequently followed? A. I did.

Q. Who, if you know, cut off the cars?

A. The brakeman, Mr. Kline.

Q. What was his name?

A. Max Kline, they called him.

Q. Did you notice what, if anything, he did after cutting the cars?

A. He jumped on the tail end of the car they were hauling, with his feet on the grease-box or axle-box, and hung on to the handles they have on the cars to climb up on, and rode as far as the switch.

(Testimony of C. A. Davidson.)

Q. Did he climb up on the cars, do you recollect?

A. No, not then. He did when they were coming by. I [135] kept watching then. He had no more gotten up there and was sitting there than he noticed these four cars coming down.

Q. When was it you saw him make the motion?

A. He must have been right opposite these other four that were following then.

Q. You couldn't say about how close these cars that were following were to the car on which Kline was sitting at the time he made the motion?

A. It couldn't have been very far—pretty close.

Q. What kind of a motion did he make, do you recollect?

A. Pretty quick. I was kind of anxious myself.

Q. Did he put his hands down?

A. I know he put one down quick, and I think he kind of hung on to the brake to get up, and I quit watching him.

Q. Do you remember which side of the car Kline was climbing up on?

A. I didn't see him climb up that car.

Q. You didn't see him climb up?

A. No.

Q. You saw him jump on the grease-box of the wheel?

A. When he rode to the switch he did.

Q. That is what I mean.

A. That is what I saw him do.

Q. Which side of the car?

A. The right-hand side going.

(Testimony of C. A. Davidson.)

Q. In the same direction the car was going?

A. Yes.

[136] Q. The same side the switch was on. That would be the west side, wouldn't it?

A. No, it must be the east.

Q. I show you Plaintiff's Exhibit One, and ask you to indicate on it which side Kline jumped on the car when it was in motion.

A. He jumped on here (indicating) and rode as far as the switch here—the car coming this way.

Q. So when he cut off the cars and boarded the cars attached to the engine, what side of the track would you say he was then on?

A. Well, he jumped across over here. I seen him several times do it. But I couldn't say I seen him get on this train at all after he got off the switch.

Q. I mean immediately after the cars were cut—separated one from the other. You testified, as I recollect, that he stepped on the grease-box of the car attached to the engine? A. Yes, sir.

Q. And hung there for a while?

A. Yes, sir, as far as the switch.

Q. Now, which side of the car was he on?

A. On the right-hand side.

Q. The right-hand side as you were going? That would be the easterly side? A. Yes, sir.

[137] Q. Do you know who the engineer on that train was on that occasion? A. Yes, sir.

Q. Who? A. Mr. Clark.

Q. The plaintiff in this action? A. Yes, sir.

(Testimony of C. A. Davidson.)

Q. Did you go up to where the cars collided one with another? A. No, sir.

Q. What did you do after you shouted to Mr. Gatti and the others to come out?

A. I stood then and watched how things came out —I could not leave the shop.

Q. You didn't leave the shop? A. No, sir.

Q. Did you see anything else after that?

A. Mr. Clark was going home.

Q. Did you see him when he was going home?

A. Yes, sir.

Q. Do you recollect who, if anyone, was helping him?

A. Mr. Gatti was with Mr. Clark at that time.

Q. Did you notice Kline all the time from the time he got off the car up to the time you saw him make the motion you described?

[138] A. No. I noticed him— He climbed up on the end of this car going up the hill.

Q. Which car is that—the one attached to the engine or the others?

A. The head car attached to the engine. He had no more than got seated there than he noticed these loose cars coming down towards him—the four of them. With that he made a motion and he got up on the car at the same time.

Q. After he cut off the cars he didn't go back to the cars that were stationary? A. No, sir.

Q. At the time he cut off the cars were the ones which followed the engine in motion or standing still? A. Well, they followed—

(Testimony of C. A. Davidson.)

Q. What? At the time of the cut off?

A. They looked like they were standing still, but right after they left those cars I thought they were moving, and to be sure of my thought about it I seen the wheels—you could see the bright wheel moving.

Q. At the time Kline was hanging on to the other car going down to the engine?

A. Yes, sir, he didn't seem to notice they were following at all—didn't know it.

Q. Do you know what kind of car it was that came immediately after the tender on Mr. Clark's engine?

A. No, I couldn't say that.

Q. Do you recollect whether it was a flat or a top car?

[139] A. A coke-car—stock-car they use for handling cattle.

Q. What kind of cars are they?

A. They are all loosely boarded.

Q. High boards? Not flat? A. No.

Q. Do you know on what side of the engine Mr. Clark was sitting?

A. He was sitting on the right-hand side of the engine facing town.

Q. Do you know whether Mr. Clark could have seen the other cars approaching? A. No, sir.

Q. Could he have seen them?

A. I don't think so.

Q. In your judgment, how long was it after you saw Kline give this signal? A. Right at once.

Q. You mean the collision occurred—

(Testimony of C. A. Davidson.)

A. No, the train stopped—it slacked up.

Q. About how long after you saw him give that signal did the collision occur?

A. Hardly any time afterwards.

Q. Hardly any time?

A. Right prompt after he gave the motion, or whatever he done—I don't know exactly—that motion.

Q. About how many seconds would you say, in your judgment?

[140] A. A second or two, I imagine—things looked pretty quick.

(By Mr. McFARLAND.)

Q. A second or two?

A. I thought so—pretty quick work.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. KIBBEY.)

Q. How far is your shop from this point of collision, Mr. Davidson?

A. Oh, it is between—something like four hundred and fifty and five hundred feet.

Q. In what direction—up or down the track—say north or south?

A. What we call up town—it is north.

Q. Your shop is north of the switch?

A. Our shop is south.

Q. Of the switch? A. Yes, sir.

Q. Towards the bridge? A. Yes, sir.

Q. Now, you say Kline rode this car up from the point where he cut it off to the switch?

(Testimony of C. A. Davidson.)

A. Yes, sir.

Q. On over that switch?

A. I think Mr. Kline did.

Q. And he was riding on the grease-box?

A. Yes, sir. Had his feet on there and had hold of [141] the rounds.

Q. Did you see him get off to throw the switch?

A. Well, I couldn't say for certain now, of course, but I am pretty certain I did.

Q. You don't know, then, whether he threw the switch or not?

A. Well, I wouldn't be positive about that. Pretty certain I seen him get off there, and I think he threw the switch.

Q. On which side of the track is the switch-stand?

A. The right-hand side going up.

Q. It would be, then, on the same side you were?

A. Yes, sir.

Q. Was there anything to obstruct your view of the switch-stand? A. Not a thing.

Q. How far beyond the switch did the car run which he was riding?

A. Well, as a rule, according to the train they have—whether they go way around the bluff—

Q. No, on that particular day, I mean. How far did they go that day?

A. Well, I couldn't say now.

Q. You say you can't say?

A. I wouldn't say positive about that.

[142] Q. Where was the car at the last moment you saw Kline hanging on to the grease-box?

(Testimony of C. A. Davidson.)

A. At the switch—off the switch this way.

Q. He got off the cars on your side of the track?

A. Yes, sir.

Q. At the switch? A. Yes, sir.

Q. Where did you next see Kline?

A. On top of the car that Mr. Clark was backing up the hill.

Q. He was on which car of the four?

A. The first car going up the hill.

Q. Then he was not on the car next to the engine?

A. No, sir.

Q. Was anybody on the car next to the engine?

A. I didn't see anybody.

Q. You were looking at the cars, were you not?

A. That is about all the cars you can see, the first car, when they are going up, on account of the bend and the curve, the engine and the cars ahead are out of your view.

Q. You could see the cars before the collision?

A. Yes, sir, I could see that car; it is further than the others.

Q. Could you see the cars at the point of collision?

[143] A. I could see the loose cars—the first car.

Q. The which car?

A. The first car of the four that ran down of themselves.

Q. That were on the main line? A. Yes, sir.

Q. Then you couldn't actually see the point of collision—that was on the opposite side of the cars to you? A. Yes, sir.

(Testimony of C. A. Davidson.)

Q. But you could have seen if there had been a man on that car right next to it on the Shannon switch? A. No, I couldn't have seen him.

Q. Why not?

A. Those four cars that went down by themselves were in the way. I could have seen them if I had run on the other side of the road.

Q. If he was on top of the car and the cars were of equal height?

A. To make the Shannon hill after they pass the switch, the Shannon hill road is much higher.

Q. You didn't see anybody on the front car, the car next to the engine at any time? A. No, sir.

Q. Now, immediately upon the impact of the two — What was the speed of the cars going up the Shannon switch?

A. I don't know. They generally go up pretty fast.

Q. At that particular time?

A. The same as usual.

[144] Q. Did those cars stop there before the collision? A. No, sir.

Q. At what rate of speed do you think they were going at the moment of the collision?

A. I don't know much about that, but I know they were going pretty fast. That is, the train the engine was on were making the hill pretty fast.

Q. Now, immediately after the collision what became of the cars on the Shannon switch and of the engine?

A. Well, it stopped right away afterward.

(Testimony of C. A. Davidson.)

Q. How long afterward?

A. No time to amount to anything.

Q. Two or three seconds? A. I guess.

Q. How far had it gone past the point of collision?

A. From where I was standing it didn't look very far.

Q. It did pass, however, didn't it?

A. I couldn't tell you that; I wasn't right there.

Q. Couldn't you see whether the engine had entirely passed the four cars?

A. No, I couldn't see the engine, only the top of it.

Q. If the engine or any part of it had been north of the string of cars on the main track, you could have seen the engine?

A. No, not at that time.

Q. Why not?

[145] A. Because those four cars obstructed the view.

Q. You don't know whether the four cars and the engine on the Shannon switch went by the point of collision after the collision?

A. I know that the train that the engine was on, after it struck, stopped right afterwards and then it ran back a ways. That is when the whistle began to whiz.

Q. How far past that point—did it instantly stop at the point of collision?

A. At that time it was pretty hard for me to tell.

Q. Did you notice it went by and then came back, and of the second collision?

A. I knew it came back.

(Testimony of C. A. Davidson.)

Q. And there was a second collision?

A. I think so, because then I could see the forward car off the track, it looked like to me.

Q. When did that forward car get off the track?

A. I think at the second collision.

Q. What caused the second collision?

A. When the engine ran back.

Q. Then the train did pass the point of collision, didn't it?

A. That I don't know. I wasn't right there, at no time. I never went down to the train at all. Stayed right where I was.

Q. Now, in what direction were you from this—how far was your shop from the track?

[146] A. About ten or twelve feet—something like that.

Q. And four hundred and fifty feet from the point of collision? A. Something like that.

Q. Where were the cars on the main track when you first saw them moving? Directly opposite you?

A. The four loose cars?

Q. Yes.

A. No, they were below the road crossing, and the road crossing was below me.

Q. What do you mean by below? A. North.

Q. Where is your store with reference to the Shannon store? A. South of the Shannon.

Q. On the same side of the track? A. Yes, sir.

Q. How far away from you was the cut made in the cars?

(Testimony of C. A. Davidson.)

A. Well, I should imagine about halfway between me and the switch.

Q. About halfway between you and the switch?

A. Yes, sir, something like that. Maybe more than halfway.

Q. Those cars were left there where that cut was made? A. They were supposed to be left there.

Q. You saw them?

[147] A. I thought they seemed to follow up right away as soon as they left them.

Mr. KIBBEY.—That is all.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of Henry Doran, for Plaintiff.]

HENRY DORAN, called as a witness in behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Mr. Doran?

A. Henry Doran.

Q. Mr. Doran, what is your business?

A. Locomotive engineer.

Q. By whom are you employed?

A. The A. & N. M. Railway.

Q. The defendant in this suit? A. Yes, sir.

Q. How long have you been in their employ, Mr. Doran? A. A little over four years.

Q. Continuously? A. Yes, sir.

Q. Without a break? A. Yes, sir.

Q. At that is the last four years?

(Testimony of Henry Doran.)

A. I went to work the 21st day of December, 1907.

Q. Have you been with them ever since?

A. Yes, sir.

[148] Q. Had you ever been in the railroad business before that? A. Yes, sir.

Q. How many years? A. Since 1892.

Q. Have you been engaged in railroading ever since? A. Yes, sir.

Q. In what other capacities, if any, besides railroad engineer? A. Locomotive fireman.

Q. Do you know Mr. Thomas P. Clark, plaintiff in this case? A. Yes, sir.

Q. How long have you known him?

A. Since my arrival in Clifton. I got acquainted with him when I came to Clifton.

Q. That was in 1907? A. 1907, yes, sir.

Q. Do you remember the collision that occurred when Mr. Clark was injured, near the Shannon switch in March, 1911?

A. Yes, sir. I remember the circumstance.

Q. Where were you at the time the collision occurred?

A. I was working around there somewhere. I wasn't present.

Q. You didn't see it? A. No, sir.

Q. How soon after that did you come on the scene?

[149] A. I didn't see them until they brought the crippled engine to the roundhouse, is the first I seen of it.

Q. What was the condition of the engine, particularly on its right side?

(Testimony of Henry Doran.)

A. Well, I noticed the air-pipes broken and the air-drum knocked loose and the cab damaged some.

Q. What was the condition of the tender?

A. I noticed the tender was damaged some—the grab-irons knocked off the side is all I noticed about the tender—scratched a little.

Q. Did you notice any splinters or rubbish around the cab?

A. There was a little when it came to the round-house, but they had possibly been removed before they brought it there.

Q. Do you know who the train crew was on that particular engine at that time?

A. I don't know who all were there present, but I know the men working at the time. I couldn't say who were working with the engine at the time, for I wasn't there. Very often there are changes made in the crews on different days.

Q. Who was the yardmaster in that yard on March 15, 1911? A. Mr. Kelley, I believe.

Q. Kelley was? A. Yes, sir.

[150] Q. Tell us briefly what his duties were.

A. The duties of yardmaster?

Q. Yes.

A. The duties of yardmaster is to direct the handling of cars and trains within yard limits. He has charge of the switchmen and engine foreman and of the switching engine, and he shifts the cars about to different places wherever business desires.

Q. Does the engineer of the switch engine take any instructions from him at all?

(Testimony of Henry Doran.)

A. Yes, sir, he is under the yardmaster's instructions.

Q. Who was section foreman there?

A. I don't remember. You mean who is there at present?

Q. No, on that occasion. Not section foreman, but who was the foreman?

A. I don't remember who was acting foreman at the time.

Q. You don't recall?

A. No. Sometimes it is changed—the foreman might be laid off and someone acting in his place. I don't remember who was acting engine foreman at the time.

Q. How long had Kelley been the yardmaster in that yard?

A. I don't know how long he had been working for the company. He was there when I went there.

Q. Had he always been yardmaster from the time you went there? [151] A. Yes, sir.

Q. That was back in 1907? A. Yes, sir.

Q. Do you know what, if any, position Kline occupied with reference to this train and switch engine? A. At that time?

Q. Yes.

A. No, right at the time of the accident I don't remember. I knew he was working in the yard, but didn't know what position he was in on that particular day.

Q. Do you happen to know who the fireman was on the engine?

(Testimony of Henry Doran.)

A. Mr. Jack Chambers was the fireman.

Q. Had you had any talks with Mr. Kelley, the yardmaster, in regard to the moving of cars that didn't have brakes set on them?

A. Some time before that I did.

Q. About when was it?

A. During the months of May and June, 1910, I was on the switch engine sometime during those two months.

Q. What did you say to Mr. Kelley at that time?

Mr. KIBBEY.—We object. How could a conversation between two employees of the road be competent?

The COURT.—Mr. Kelley was the foreman?

Mr. SEABURY.—He was the yardmaster.

[152] Mr. KIBBEY.—And here was a conversation between them.

The COURT.—How do you think that bears?

Mr. SEABURY.—I think that bears very materially. What we intend to show is that Kelley, the yardmaster, as the witness has testified, was charged with the duty of directing the movement of those cars. We intend to show that Kelley had knowledge of the fact that cars left in this particular position without having the brakes set were liable to move, and that complaint was made to him in regard to it. And we wish to show what Kelley said with reference to it.

The COURT.—Is that, do you think, admissible to show negligence on the part of the company directly?

Mr. SEABURY.—We think it is admissible to

(Testimony of Henry Doran.)

show that the plaintiff had the right to rely upon the fact that his brakemen were going to set those brakes. That it bears upon the question as to whether the company had notice, through its yardmaster, of the fact that those cars were liable to move. By this witness we wish to prove that he was told that they would move and that they were dangerous. If the yardmaster charged with the moving of those freight-cars in that yard knew they were liable to move, either because he had seen them or was told they were going to move, certainly we think it would clearly show he should have given directions to have the cars braked.

The COURT.—You think it required care—the exercise of care—on his part?

[153] Mr. SEABURY.—Yes, your Honor, and your Honor will recall that we may base our recovery on the negligence of any fellow-servant of this company, abrogating, of course, the old rule. So we claim the negligence of Kelley the yardmaster if shown by his refusal to act for the protection of plaintiff's welfare would constitute negligence.

The COURT.—I presume if they rely on the negligence of Kelley as a fellow-servant, they would have to show all the elements of negligence—knowledge—or such facts as ought to impute knowledge to him, of the necessity for some degree of care.

Mr. KIBBEY.—We don't object to their showing notice to the defendant, but we object to their getting at it in this way.

Mr. SEABURY.—I will withdraw the question.

(Testimony of Henry Doran.)

(To the Witness.)

Q. Mr. Doran, had you ever seen cars on the main line of this track immediately south of the Shannon switch move of their own volition or power?

A. Yes, sir.

Q. About how often had you seen that occurrence?

A. Twice during the time I was on the switch engine during the two months I mentioned—May and June.

Q. About where would you say those cars were located [154] when you saw them?

A. Between the switch and the crossing.

Q. About how many cars were on the main track that moved at that particular time?

A. I don't remember the exact number. At one time the whole string moved ahead and at one time there was just one left that ran out on the frog and ran out when I went up the hill. At one time they moved ahead before we started up the hill. I don't remember how many cars were in the string.

Q. Do you recollect that it was more than four on that occasion?

A. I couldn't say more than four—I don't remember how many.

Q. But you have seen one car left there move of its own volition?

A. One car alone moved out on the switch. There were others standing back of it on the main line. That is, after I went up the hill and came back.

Q. Now, do you know whether the yardmaster Kelley was ever present?

(Testimony of Henry Doran.)

A. He was present when the one car rolled out. He was the man that flagged me when I came down the hill.

Q. Do you know whether or not the brakes were set on that car? A. I do not.

[155] Q. If the brakes had been set would the car have moved?

A. I shouldn't think it would; the grade isn't very steep.

Q. Not steep enough to allow a car with brakes set on it to move?

Mr. KIBBEY.—We object to the question. It is leading and assuming facts and all sorts of things.

The COURT.—I sustain the objection.

(By Mr. SEABURY.)

Q. Now, Mr. Doran, did you ever talk with Mr. Kelley about cars moving by themselves at that point? A. Yes, sir.

Mr. KIBBEY.—We object. He has testified Mr. Kelley was there and saw them.

The COURT.—Yes, I think so. Do you want to show the admission of Kelley?

Mr. SEABURY.—We want to show by this witness that he discussed the movement of these cars by their own volition as it were with Kelley, and that he made a request of Kelley, as the yardmaster charged with the control of those things, to see to it that they should not roll thereafter, and I wish to show Kelley's response.

Mr. KIBBEY.—Kelley could not bind the defendant by any response he might make.

(Testimony of Henry Doran.)

The COURT.—He could bind the defendant in this respect: if his carelessness—if the defendant is bound by his negligence, then you may charge the facts to him from which [156] negligence may be inferred as a matter of law—knowledge of the situation there and the degree of care which that situation called for.

Mr. KIBBEY.—We have no objection to that, but we do have objection to any discussion between this witness and Kelley.

The COURT.—How would you prove knowledge of the situation there? His own declarations might prove that, might they not?

Mr. KIBBEY.—His own declarations could not possibly prove negligence.

The COURT.—Not his declarations, but his knowledge.

Mr. KIBBEY.—If this witness had said, "Kelley, that is dangerous," I don't know as we would have any objection to it, but we do object to a discussion of the matter between these employees.

The COURT.—Suppose the statement instead of coming from the witness had come from Kelley himself—assuming Kelley said the place was dangerous?

Mr. KIBBEY.—That is an attempt to prove knowledge by the agent's declaration. You can prove it by the agent himself. You can't prove it by the declaration of the agent to a third person.

The COURT.—It would indicate that his attention had been called to it. I think it is admissible. If you may prove [157] his knowledge in any way

(Testimony of Henry Doran.)

I think you may prove it by his own declarations.

Mr. KIBBEY.—We object to it that the defendant is not bound in any way by the declaration.

The COURT.—The defendant may not be bound by it, but—

Mr. KIBBEY.—If the defendant isn't bound by it, it is immaterial.

The COURT.—I overrule the objection.

Mr. KIBBEY.—We except.

(By Mr. SEABURY.)

Q. Tell us what talk you had about this particular matter.

A. I don't remember the exact words we had, but that was the second time when one car rolled, it was the second time they rolled on me, and I said to him —I spoke to him about setting the brakes on those cars and he said he would not.

Q. He said he would not?

A. That is the substance of what he said.

Q. You told him the cars were moving that way.

A. Yes, sir; I asked him why he didn't set the brakes on those cars and he said he would not. That is when they rolled the second time on me.

Q. Did you ever speak to him again about it?

A. Not that I remember.

Q. Do you know whether anyone else spoke to him about it? A. No, sir, I do not.

Q. Did you see Mr. Clark after he was hurt?

[158] A. Not right directly afterwards. I did a few days after.

Q. On any of those times you say the cars rolled

(Testimony of Henry Doran.)
without any motive power, was Kline present?

Mr. KIBBEY.—He has not said he saw the cars roll or saw them roll without motive power. He said he saw them out on the frog.

Mr. SEABURY.—I certainly understood him to say that on two occasions he saw cars moving without any motive power except their own.

Mr. KIBBEY.—I didn't understand that he used the word "motive power" at all.

Mr. SEABURY.—I don't think he used the word "motive power"—

Mr. KIBBEY.—Then we object to his saying—

The COURT.—At the time he saw these cars move as he testified. You may call his attention to the incident about which he testified.

(By Mr. SEABURY.)

Q. Do you know what it was that made these cars move on these two occasions you have specified?

A. They rolled out of their own accord, I suppose. There was nothing around to cause them to roll. They were left setting there. One time they rolled of their own accord and I pulled ahead and the cars followed and I had to push them back before I went up the hill. The second time I went up with a cut of cars and came back and one car had rolled out and blocked us, and Kelley was there and flagged us when I came back. I don't know what caused it to roll out unless it rolled of its own accord.

[159] Q. At the time you saw the cars move was there any engine attached to the other end of the car, or any other motive power? A. No, sir.

(Testimony of Henry Doran.)

Q. Now, I ask you whether on either of those occasions Kline was present?

A. I don't remember whether he was or not.

Q. Do you know whether Kline had ever seen cars move in that position of their own accord?

A. No, sir, I do not.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. KIBBEY.)

Q. If the train is not entirely stopped moving forward and the cars are uncoupled the cars will naturally follow the engine?

A. If not entirely stopped?

Q. Yes.

A. Very likely they would.

Q. Sometimes it does happen that a coupling is broken or uncoupled when the cars are really in motion? A. I don't understand.

Q. I say it does sometimes happen that the uncoupling is made when the cars are really in motion?

A. Not at that place.

Q. That is never done?

A. They always stop the cars still before they go up [160] the hill, because if they didn't they couldn't pass the cars, they would follow you on down to the switch.

Q. It does sometimes happen, though, that the pin is pulled when the cars are still in motion?

A. Around yards and different places?

Q. Yes.

(Testimony of Henry Doran.)

A. That very often happens in switching at different places.

Mr. SEABURY.—We object to around yards and different places. The inquiry should be addressed to this particular place.

The COURT.—The answer is in, it may stand.

(By Mr. KIBBEY.)

Q. When was it you had this talk with Kelley, and Kelley said he didn't intend to put the brakes on?

A. During the time I was in the switch engine.

Q. How long ago? A. May and June, 1910.

Q. Longer ago than that? A. What?

Q. That is the first time you spoke to him about it?

A. The first and only time.

Q. About what time in 1910 was that?

A. May and June—I don't remember the exact time, but I was on the switch engine during those two months.

Q. After that were you on the switch engine at all?

A. I have been on it at different times for a day or [161] two or a few days.

Q. You were on the engine after that?

A. Yes, sir, after that time. From that time up to the present time I have been on the switch engine at different times.

Q. With reference to the time you say you knew those cars rolled. A. Sir?

Q. Upon which occasion was it you say those cars rolled that you had this talk with Kelley?

A. The second time.

Q. Was that time the time you found the single

(Testimony of Henry Doran.)

car on the frog? A. Yes, sir.

Q. You didn't see that car roll down there, I understand?

A. No, sir, the car was there when I came back.

Q. It wasn't there when you left?

A. If it hadn't been in the clear I couldn't have passed it.

Q. Was that all that was said between you and Kelley on that subject? A. At that time?

Q. Yes. A. That is all I remember of; yes, sir.

Q. Did you report that to anybody—that conversation? A. Sir?

[162] Did you report that conversation to anyone? A. Report it to anyone?

Q. Yes. A. No, sir, I made no report of it.

Q. Were there any other superior officers of the road located at Clifton at that time?

A. I suppose there was; yes, sir. The general offices are at Clifton.

Q. And you made no report to any of those officers? A. No, sir. I made no report.

Q. Of Kelley's refusal to direct the brakes to be set on those cars when left on that track?

A. No, I made no report.

Q. Why not?

A. Because it had been the custom to do the business that way, and I supposed he knew what he was doing.

Q. You say it has always been the custom to do the business that way?

(Testimony of Henry Doran.)

A. While I was on the engine; yes, sir.

Mr. KIBBEY.—That is all.

Redirect Examination.

(By Mr. SEABURY.)

Q. You were asked the question whether cars could be uncoupled and still be in motion at that place. I ask you whether in March—

Mr. KIBBEY.—I didn't quite ask that question. In fact, you objected because I didn't confine it.

Mr. SEABURY.—If you have any objection to make, I wish you would make it.

[163] Mr. KIBBEY.—We object.

The COURT.—What is the objection?

Mr. KIBBEY.—He is assuming I asked a question that I didn't ask.

Mr. SEABURY.—I will withdraw it and put it in another way.

(To the Witness.)

Q. Mr. Doran, do you know whether in March, 1911, there was any substantial grade between the company's store and the Shannon switch?

A. I wouldn't call it a substantial grade.

Q. Was there any grade?

A. Grade enough for the cars to roll. I don't know what per cent.

Q. But there was enough grade to allow a car to roll? A. Yes, sir.

Q. Now, in order to uncouple a train of cars was it not necessary to bring the whole train to a stop on that place?

(Testimony of Henry Doran.)

Mr. KIBBEY.—We object to the question as leading and suggestive.

The COURT.—It is leading.

(By Mr. SEABURY.)

Q. Well, I ask you, could a car be uncoupled there without bringing it to a full stop?

A. It could be done; yes, sir.

Q. How could it be done?

A. Very easily. A car is very often uncoupled on the run [164] in making a flying-switch and so forth.

Q. Now, you have heard the testimony in this case as to how this accident occurred? A. Yes, sir.

Q. Would you say this was any case of a flying-switch?

Mr. KIBBEY.—We object to the question.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

(To the Witness.)

Q. If cars were to be uncoupled there while in motion, will you tell us how you do it?

A. Uncoupled while in motion? That is easily done. Give the switchman the slack of the pin and he can uncouple them, and then move away from them. Don't have to come to a stop. He can raise the coupler rod and release it from the other cars any time you give him slack on the train.

Q. If that method of uncoupling cars is not used, what would you say then as to whether it was necessary to bring the cars to a full stop before uncoupling them? A. How is that?

(Testimony of Henry Doran.)

Q. I say, if that method of uncoupling cars is not used, how else could you uncouple them?

A. There are different ways of uncoupling them. That is the present method of uncoupling cars. Cars have all uniform couplers.

Q. What I mean is, would the car have to come to a stop [165] to uncouple in any other way except by a flying-switch?

A. It wouldn't be necessary to stop the cars if you don't want to. You can uncouple cars in motion at any time if you so desire.

Q. And the grade would not affect the question?

A. No, the grade would not affect it if they were prepared to handle them. That depends on what the trainmen want to do with them.

Q. Do you know how the cars at this particular place were uncoupled in March, 1911?

A. No, sir, I don't know. I wasn't present at the time.

Recross-examination.

(By Mr. KIBBEY.)

Q. The pin can always be pulled if there is a slack between the couplings?

A. The pin can be pulled if they give you slack on the train.

Q. No matter how fast the train is running—fifty or a hundred miles an hour—if there happens to be slack there you can lift the pin.

A. Yes, sir, you can do it.

Mr. KIBBEY.—That is all.

(Witness excused.)

[Testimony of G. F. Chambers, for Plaintiff.]

G. F. CHAMBERS, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

[166] Q. What is your name?

A. G. F. Chambers. Known as Jack Chambers, which you have already heard me called, I suppose.

Q. Mr. Chambers, what is your business?

A. Locomotive fireman.

Q. How long have you been engaged in that occupation?

A. The best I can remember seven years last August.

Q. With what concern, if any, are you now employed?

A. With the Arizona and New Mexico Railroad.

Q. That is the defendant in this suit?

A. Yes, sir.

Q. How were you employed in March, 1911?

A. As fireman—locomotive fireman.

Q. For the defendant? A. Yes, sir.

Q. Were you the fireman on Mr. Clark's engine involved in this collision? A. Yes, sir.

Q. Now, will you please tell us what took place on the 15th of March, 1911, with reference to this collision that has been described?

A. Well, we were working Shannon hill, and we had twelve cars, the best I remember, and in order to clear Shannon crossing as we have heard so much

(Testimony of G. F. Chambers.)

about, we shoved eight cars over the crossing and left them stand on the main line, and went up the hill with four. On coming back we [167] coupled into the eight and pulled them up just to clear the Shannon switch and brought them to a stop, cut off four cars on the main line and proceeded to go up the hill again the second time. And after running over the switch, as we backed up the cars ran down the main line and cornered our engine.

Q. That is the last four cars that were left standing on the main line?

A. Yes, sir, the four cars we left standing on the main line.

Q. What part of it did they strike?

A. The engine-cab and just enough of the tender to get the grab-iron on the tender.

Q. What kind of car was it that was immediately next to the tender and attached to the tender?

A. I don't just recall. It was what we call a high one—either a box or stock-car.

Q. When did you first observe these cars in motion, if at all?

A. Couldn't tell that they were in motion at all at any time until after the first collision.

Q. Please tell us what your position was in the engine-cab and what Mr. Clark's position in the engine-cab was immediately prior to the collision.

A. Well, he was sitting on his side of the cab on his seat-box in the usual position to perform the duties of an engineer.

(Testimony of G. F. Chambers.)

Q. Which side?

[168] A. The right-hand side, always—and I on the left-hand side. I don't just remember whether I was looking through the side window or the back window—I don't just remember.

Q. What took place just before the collision occurred? A. When we got a back-up signal—

Q. From whom did you get the back-up signal?

A. I don't just remember—probably from either one of the switchmen. It was probably St. Thomas. He was on the car next to the engine sitting on top. Just before we came to a stop I put in a fire and at that time probably Mr. Clark got the signal while I was putting in this fire, to back up. They threw the switch and gave a back-up signal and we started rolling ahead. I don't just remember now who got the signal—whether it was he or I. Might have been from either one of the switchmen. Oftentimes the man that throws the switch will step over and give the back-up on my side.

Q. Who were the switchmen?

A. In this case Mr. St. Thomas and Mr. Kline.

Q. Did you get a stop signal from anyone after you began to back up Shannon hill? A. Yes, sir.

Q. From whom? A. Kline.

Q. Where was he at that time?

A. On the fourth car from the engine, what we call the head car we were shoving.

Q. On which side of the car was he with reference to the Shannon track, do you know? Would the

(Testimony of G. F. Chambers.)
picture help you?

[169] (Handing photograph to witness.)

A. I don't need that. Very near the center—just aside from the running-board—would be called the west side—is the best I remember—with his feet hanging down over the end or side of the car. I can't tell positive, but I think that is the position he was sitting in.

Q. What kind of a signal did he give you?

A. What we call a washout signal—stop.

Q. What does that kind of a signal mean?

A. Stop.

Q. What did you do with it?

A. Delivered it to Mr. Clark both verbally and with my hands.

Q. What took place then?

A. He stopped as soon as possible. He applied the air in the emergency.

Q. How soon after that signal before the collision came, do you recall?

A. I would say not over three seconds—four at the outside. Only a matter of going about three car-lengths. Of course I couldn't see that at the time we got the signal, but I would say not over three or four seconds from the time we got the signal until they hit the first time.

Q. From your position in the cab could you not see the cars with which you collided?

A. I could see them at the time we started to back up. [170] Probably while we were going a car and half, and then I would see them no more until we

(Testimony of G. F. Chambers.)

got far enough by for the end of the first car to come in view—me looking across the tank.

Q. How close would they be to your engine at the latter time?

A. I could probably see the car a car-length and a half maybe. Possibly see the crossing of the grade a car-length and a half from where I was sitting before we would hit them—not any further than that anyway, as the car we were coupled into was a high one and it of course obstructed the view of them other cars.

Q. Do you know when if at all Mr. Clark could see the approaching cars immediately prior to the collision?

A. Well, he could have seen them a little further away than I could, but it is only a guess about how far. He might see them, oh, possibly two cars or two cars and half maybe.

Q. Just before the collision occurred, the car that was nearest to your engine tender was going around that little curve in Shannon switch, wasn't it?

A. Yes, we were on that curve.

Q. What, if any, tendency would that have on the car immediately attached to your tender in obstructing the view or making it clear for the plaintiff to see the approaching car?

A. I don't know whether I quite get what you mean. Is it your meaning that on this curve would he be able to see the car more plain or not so plain?

[171] Q. That is what I want you to tell us. I want to know which from you.

(Testimony of G. F. Chambers.)

A. As soon as the car hit the curve he could see the approaching cars more plain than he could before.

Q. That would depend, would it not, on how far up the Shannon switch you had gone?

A. Well, there is nowhere between there and the next curve on the Shannon track but what he could see just as plain—until you get to the next curve.

Q. Now, do you know whether or not the car immediately attached to the tender obstructed the plaintiff's view?

A. Yes, it did. Not just at the time of the collision, but before that, previous to that, he couldn't see at all for the cars that we were pushing.

Q. Did you know why you had been given a stop signal?

A. No, I supposed we were killing a man. We killed two there and I supposed were getting another.

Q. Do you know whether Mr. Clark knew what was the occasion of the stop signal?

A. No, he had no way of knowing.

Q. He had none? A. No.

Q. But you say he obeyed the signal, as I understand? A. Yes, sir.

Q. What took place immediately after the collision, Mr. Chambers?

A. Well, as soon as they collided we ran on up the hill. There is a pretty heavy grade there and there was nothing to [172] hold us after the collision, as our main reservoir had been knocked off and we had no brakes. We ran a sufficient distance for the grade to stop us and they started back down.

(Testimony of G. F. Chambers.)

Just as soon as they hit I turned around to see Mr. Clark—to see what I could do for him. I thought he had some of those boards run through him, was the first thing I thought of. Just about the time they come to a stop he hollered to me to get up and stop them. Of course he knew we would roll down and collide again. So he pulled himself out of the gangway some way. I was still on the engine trying to stop them from colliding the second time, and they ran down and hit again, and I got on to the ground until they collided the second time, and just after that I got back on and finished the job of stopping them.

Q. Could you see Mr. Clark on the ground near the track?

A. Not until after I had stopped the engine and done a few little jobs that had to be done immediately after the smash-up.

Q. Which side of the engine was he on—when you saw him on the ground, I mean—which side of the track? A. On the west side.

Q. Is there anything else that you recall taking place then? A. No, I believe not.

Q. Did you notice Mr. Clark's condition at that time?

A. No, I didn't—not particular. I noticed he was hurt, but couldn't tell how bad. They took him home before I could [173] get away from the engine.

Q. You didn't see who took him? A. No.

Q. When the stop signal was given, could you see

(Testimony of G. F. Chambers.)
the approaching cars, or could Mr. Clark?

A. No, neither of us could.

Q. Do you know whether Mr. Kelley was there at the time of the collision? A. No, I don't.

Q. You don't know whether he was there or not, Mr. Chambers? A. No, I do not.

Q. Mr. Kline was there, though, wasn't he?

A. Yes.

Q. And St. Thomas? A. Yes.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. How far were the cars pulled up from the bridge before they were stopped? How far were the twelve cars when they were first stopped?

A. Well, now, I don't know just what you mean there. I don't remember where we got those twelve cars from to start with—which yard it was in—whether we brought them down from the yard immediately in front of the depot or whether we got them from the flat. But we placed eight cars—

Q. Then the cars were there when you went down with the [174] switch engine—in front of the Shannon store—when you went down with the switch engine.

A. After going up the hill the first time?

Q. No, in the first instance.

A. No, they were not left standing on the main line.

Q. Did you pull them up in front of the Shannon store?

(Testimony of G. F. Chambers.)

A. We pulled eight of them up there in order to cut four off to make the second trip.

Q. Did you pull the twelve up there?

A. That is what I am telling you. I don't remember where we got them—whether in the upper yard. If in the upper yard we push them, and if in the lower yard we would pull them.

Q. You don't remember whether you got them from the flat? A. I don't remember that.

Q. Now, where were the remaining eight cars left after you cut off the first four?

A. The best I remember we shoved them over the Shannon road crossing. That would leave the nearest car to the Shannon switch right in front of Gatti's butcher-shop somewhere. Just to clear the road crossing was our aim, and that would leave some of them standing on the river bridge.

Q. Now, you cut off four of the twelve?

A. Yes, sir.

Q. Where were the remaining eight cars left after you cut off the first four cars on that track?

A. Well, I just finished telling you. Sitting on the main line in front of Gatti's butcher-shop.

[175] Q. How far would that be from the Shannon switch?

A. Well, in the neighborhood of four hundred feet —just a guess.

Q. Now, you cut the four cars off and pulled them beyond the Shannon switch and then pushed them up the Shannon track? A. Yes.

Q. Now, how far is it from the Shannon switch

(Testimony of G. F. Chambers.)

down there up to the Shannon smelter?

A. Oh, I don't know. I should judge about five-eighths of a mile—possibly three-quarters, at just a guess.

Q. Now, when you returned after having taken the first four cars up, did you find the eight there at the same place where they were left?

A. I would judge so. If they moved at all it was not enough for us on the engine to notice it.

Q. They were standing still when you came back?

A. Yes, sir, standing still when we coupled into them.

Q. What did you do with those eight cars that were standing there?

A. Coupled in to them and pulled up on the main line and cut off four on the main line just to clear the Shannon switch.

Q. How far would that leave the eight cars remaining south of the Shannon switch?

A. There were not eight remaining then—we cut off four of them.

[176] Q. After you cut off four of the eight, where did you leave the four that remained on the main line?

A. We left them just to clear the Shannon switch.

Q. How far would that be from the Shannon switch south?

A. Well, in order to clear they would have to stand away from the switch about one hundred feet.

Q. A hundred feet?

A. Something like that. I don't just know what

(Testimony of G. F. Chambers.)

the curve is there.

Q. Then the four cars you left there would be about one hundred feet south of Shannon switch?

A. Something like that. Possibly not quite so far. That would depend on the curve of the Shannon track leaving the main line. I don't know just how far it would be.

Q. Now, when you pulled the second four cars off the main line, shoving them up on the Shannon switch, how far had you gone before you got this stop signal?

A. I would say a car and a half on a guess. After we had started to back up we had probably gone a distance of a car and a half, maybe two cars—we had developed a speed, I suppose, of six miles an hour.

Q. You were going six miles an hour?

A. That is the best of my judgment.

Q. Then you got this signal two car-lengths before you got to the frog? A. No, I can't say that.

[177] Q. How far was the engine from the frog when you got the signal? A. Well, I don't know.

Q. Well, approximately. Was it an inch from it?

A. How is that?

Q. Was it as much as a foot?

A. Yes. When we got the signal our distance from the frog must have been—

Q. The distance of your engine?

A. Three or four cars. That is, our position on the engine must have been, I judge, three or four cars.

Q. That would be about one hundred and sixty

(Testimony of G. F. Chambers.)

feet, wouldn't it, assuming forty feet to the car?

A. Yes, if you wish to call it forty feet.

Q. Now, one hundred and fifty feet, approximately, from the frog when you got the signal, at what distance, going six miles an hour, could the engineer have stopped that train? A. I don't know.

Q. Could he have stopped it in the length of the engine and tender? A. No.

Q. In two car-lengths? A. No.

Q. In three? A. No, sir.

[178] Q. Could he stop it in four?

A. No, sir.

Q. Could he stop it in five? A. Possibly so.

Q. In five? A. Possibly so.

Q. Did he apply the air as soon as he got the signal? A. Yes, sir.

Q. Reverse the engine? A. No.

Q. That is the direct air.

A. Yes, sir, it is all the braking power you can get.

Q. What kind of an engine was it?

A. Commonly called a goat—a switching engine.

Q. What is the tonnage of it?

A. About seventy-five tons—possibly eighty.

Q. Now, with straight air on a train going six miles an hour that train could not be stopped in five car-lengths from the time you got the signal? Not less than five car-lengths?

A. You say it could not be stopped?

Q. Yes.

A. Well, we couldn't stop them, anyway. I say they could not be stopped.

(Testimony of G. F. Chambers.)

Q. That would be one hundred and sixty feet?

A. Yes.

[179] Q. Upgrade, too, wasn't it?

A. Not to amount to anything.

Q. There is a slight upgrade?

A. A slight upgrade; yes, sir.

Q. Now, that is what you say, that engine and those four cars going six miles an hour could not be stopped with the application of direct air inside of one hundred and fifty feet—with straight air.

A. That is my opinion.

Q. He did put the air on? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. When you got the signal? A. Yes, sir.

Q. And you gave him the signal? A. Yes, sir.

Q. Not only verbally but by motion?

A. Yes, sir.

Q. And that was five car-lengths from the switch?

A. I didn't say that—not five car-lengths from the switch.

Q. How far did you say?

A. When I got the signal?

Q. Yes.

[180] A. You asked me how far from the frog when I got the signal, and I told you for a guess I would say four car-lengths, but you didn't ask me how far from the switch at any time.

Q. How far was it from the point at which you got the signal to the point of collision—approximately?

A. About three cars, I should guess.

Q. Didn't you say a while ago approximately about

(Testimony of G. F. Chambers.)

five? A. No.

Q. How far is the frog from the point of collision —isn't it still further south?

A. I don't know, I never stopped to think about that. I don't know just how they would shape up if you put them there together.

Q. Did your cars collide north or south of the frog?

A. I would say just about at the frog. To guess at it, it might be a few feet south, possibly.

Q. Then if they collided a few feet south of the frog, it would be a greater distance from where you got the signal to the point of collision than it would be at the frog?

A. Yes, sir, providing it was south of the frog.

Q. You mean to say that you don't know where the collision occurred?

A. I mean to say that I don't know whether it was on the frog or whether it was south of the frog— I couldn't hardly say that. It was all done in an instant. It is only [181] a guess about the point where they collided.

Q. You say he didn't reverse his engine—simply put on the direct air when he got the signal?

A. He applied the straight air in emergency.

Q. You got an emergency signal?

A. Yes, sir, what we call a washout signal.

Q. What was the condition of the throttle when you first saw it after the collision?

A. The steam was shut off—the throttle was closed.

Q. Where was the lever?

A. Which lever do you have reference to?

(Testimony of G. F. Chambers.)

Q. The reverse lever.

A. The best I remember—hooked up four notches from the center in the back motion.

Q. You say those four cars were stopped when you took the second load off the main line—the remaining four cars that were stationary?

A. When we cut off from them?

Q. Yes.

A. Yes, they were stopped dead still.

Q. Dead still? A. Yes, sir.

Q. You say that Kline and St. Thomas were the brakemen?

A. Kline and St. Thomas were the ones present.

Q. Where do I understand you to say Kline was when you were backing the cars up the hill?

A. He was sitting on the fourth car from the engine.

[182] Q. In other words, he would be four cars from the engineer—Kline would?

A. Four cars and the length of the tender.

Q. Now, where was St. Thomas?

A. He was on the first car from the engine—the one we were coupled to—sitting on the end next to the engine on the engineer's side facing the east with his feet hanging off the side of the car—facing the east and sitting just next to the ladder where you climb up the corner of the car.

Q. On the west side?

A. No, on the east side on the engineer's side.

Q. Where was Kline now—four cars ahead?

A. Yes.

(Testimony of G. F. Chambers.)

Q. What was his position at that time?

A. I just finished—

Q. Standing up or sitting down?

A. I just finished telling you that he was sitting on the end of the car with his feet hanging down the side of the car.

Q. Kline or St. Thomas?

A. Kline, I just told you about—four cars from the engine sitting on the car with his feet hanging off.

Q. And St. Thomas?

A. On the car next to the engine.

Q. Both sitting down, one on the last car and the other on the first car? A. Yes, sir.

Q. With their feet hanging down on the same side of the car?

[183] A. No; Kline was facing the way we were going, with his feet hanging down over the end of the car, and St. Thomas was facing the east with his feet hanging over the side of the car.

Q. Then Kline's back would be to you?

A. Yes, that is my recollection of it.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. SEABURY.)

Q. Mr. Chambers, do you know what railroads those cars you moved belonged to?

A. Possibly not all of them. The majority of them were C. & S.—Colorado and Southern—and Atchison, Topeka and Santa Fe. I would say probably about evenly divided.

(Testimony of G. F. Chambers.)

Q. Were there any other cars at that point at that time?

A. No, other than the twelve we were handling—taking up the hill.

Q. Those are described as foreign cars, are they not? A. Yes.

Q. How were they loaded, do you know?

A. The majority were coke. Whether there were any others in them or not I don't just remember, but the majority of them were coke. Might have been some merchandise—might have been some stock-cars loaded with coal.

[184] Q. Did the cars have anything on them to indicate where they came from?

A. No, nothing to indicate where they came from.

Q. Do you know where those cars came from?

A. No.

Q. Now, as I understood you, you said the rate of speed at which you were backing up Shannon hill was about six miles an hour?

A. Yes. It might have been a little more. It wasn't any less—we were going that fast anyway.

Q. What rate of speed is usually used going up Shannon hill with loaded cars?

A. On making the run for the hill there, we usually aim to get right up to the yard limit, which is six miles an hour. We don't aim to exceed it.

Q. In your judgment is that rate of speed required to go up there with those loaded cars or not?

A. It is.

Q. Tell us whether in your opinion, if this stop

(Testimony of G. F. Chambers.)

signal you have spoken about was not given would this collision have occurred.

A. I hardly think it would.

Mr. SEABURY.—I think that is all.

(Witness excused.)

[Testimony of Thomas P. Clark, in His Own Behalf.]

THOMAS P. CLARK, the plaintiff, called as a witness in his own behalf and duly sworn, testifies as follows:

[185] Direct Examination.

(By Mr. SEABURY.)

Q. What is your name? A. Thomas P. Clark.

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. How old are you, Mr. Clark?

A. I am sixty-six.

Q. Were you in the employ of the defendant railroad company in March, 1911? A. Yes, sir.

Q. In what capacity?

A. Engineer of a switch engine.

Q. Whereabouts? A. In Clifton yards.

Q. What were your duties at that time and place?

A. Moving cars around under the direction of the yardmaster.

Q. Who was the yardmaster?

A. John T. Kelley.

Q. Do you remember moving any cars on the 15th day of March, 1911? A. Yes, sir.

Q. Do you know what railroads those cars belonged to?

(Testimony of Thomas P. Clark.)

A. The Colorado and Southern—C. & S. as they are abbreviated.

Q. And any other railroad?

[186] A. I don't know any other cars.

Q. They were marked C. & S.? A. Yes, sir.

Q. That is the mark of the Colorado & Southern?

A. Colorado and Southern; yes, sir.

Q. What did you do with the cars that day?

A. What did we do with them?

Q. Yes.

A. Placed part of them on the Shannon smelter and the other ones we didn't get up there with.

Q. How many cars were there in that string of cars you were engaged in moving on that day?

A. There were twelve altogether.

Q. Now, please tell us what you did with those twelve cars.

A. We pushed twelve cars below—we picked them up on Hill's flat—the south yard—cut off eight cars south of the Shannon crossing as they call it—a road crossing—and kept four attached to the engine and went up from the Shannon switch and pushed them four cars up to the Shannon smelter, and we came back over the Shannon switch and backed down and took hold of the eight cars south of the Shannon crossing and pulled them all up so they would clear the Shannon crossing—pulled them north again—cut off four [187] on the main line north of the Shannon crossing between the Shannon crossing and the Shannon switch—and we pulled up over the switch and was starting for the Shannon switch when

(Testimony of Thomas P. Clark.)
those four cars got up and run into us and we didn't move them any more that day—I didn't.

Q. At the time that you cut off the last four cars that you took away from the main line, were the remaining cars stationary or not?

A. They were not in this case.

Mr. BENNETT.—What was the answer?

The WITNESS.—No, sir.

(By Mr. SEABURY.)

Q. I don't think you understand the question. What I want to know is, whether the cars you left on the main line on the last trip were stationary at the time you left them or not.

A. Oh, yes, they were stopped.

Q. Were they in motion at all at the time your engine left them? A. No, sir.

Q. What kind of a car was it you had attached to your tender, do you remember, on that last trip?

A. What they call a stock-car or a rack-car.

Q. Describe it.

A. It is for the shipment of stock—a top car, or covered car.

Q. When you were backing up the Shannon switch did you get a signal from anyone?

[188] A. From the fireman.

Q. Who was that?

A. Jack Chambers, we call him.

Q. What was the signal you got from him?

A. Stop at once.

Q. What did you do then?

A. Stopped as soon as I could.

(Testimony of Thomas P. Clark.)

Q. What did you do in order to make the stop?

A. Applied the air with full force.

Q. Applied the air with full force? A. Yes, sir.

Q. About how long after you got the signal from Mr. Chambers did the collision occur?

A. About three seconds, probably.

Q. That was all?

A. It might have been a little bit more, but not much—say three or four.

Q. When, if at all, did you first see the cars that collided with the cars attached to your engine?

A. It was immediately back of the tender and coming up almost end for end flush with the cars that was behind the tender—they didn't quite clear.

Q. Didn't quite clear the engine?

A. Didn't clear the engine at all—the cars didn't quite clear each other—the roofs of the cars.

Q. Now, about how long was it before the actual collision [189] that you saw the approaching cars for the first time? A. About two or three seconds.

Q. How long? A. About two or three seconds.

Q. What did you next recall after that collision?

A. Well, there was the collision, of course. The timbers of the cars came into the cab and knocked me out and down on to the deck.

Q. What did you do, if anything, then?

A. I couldn't do anything then, only get off the engine.

Q. Did you say anything to Jack Chambers who was in the cab with you?

A. Yes, he was in amongst the timber in the cab,

(Testimony of Thomas P. Clark.)
and I could see from my position lying on the deck that it was a dangerous place, and I told him to get out of there. I couldn't get up to help him out.

Q. Did you try? A. Yes, sir.

Q. What do you next remember?

A. The next I remember I got out of the way. I was useless—helpless—partly off the engine, and I slid on off and got on the ground and lay down.

Q. Which side of the engine—which side of the track—did you land on?

A. The west side—the left side.

Q. The west side? [190] A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Who was the crew on that train that day?

A. We were short-handed a little bit. J. M. Kline was the foreman and St. Thomas was the brakeman —two.

Q. Just two? A. Yes.

Q. Who was the foreman? A. J. M. Kline.

Q. Who was the yardmaster at that time?

A. John T. Kelley.

Q. Did you ever speak with Kline or St. Thomas in regard to putting brakes on the cars that remained on the main line?

A. Yes, sir. I can't say that I said it to St. Thomas or Kline, but the yardmen there. When they ran ahead on me once before I said they should set the brakes, and they said they would.

Q. Those were the men that were engaged in operating those cars in that yard, were they not?

A. Yes, sir.

(Testimony of Thomas P. Clark.)

Mr. BENNETT.—That is leading and suggestive, and we ask to have the answer stricken out.

The COURT.—It would be leading, except that there has been so much testimony on that subject that I assume it is—

[191] Mr. SEABURY.—I will withdraw it, your Honor. I have no desire to lead the witness.

The COURT.—The answer may stand as it is.

(By Mr. SEABURY.)

Q. Mr. Clark, what railroad was it that used that Shannon switch?

A. The Arizona and New Mexico.

Q. Was there any other railroad that used it?

A. The Coronado used it down by there—what you call the Coronado railroad, once in a while.

Q. From the switch to the smelter, I mean. Does anyone else use that part of the road except the Arizona and New Mexico railroad?

A. The Shannon engine comes down there occasionally—the Shannon-Arizona railroad.

Q. I mean on the day of this accident.

A. Not that I know of; no.

Q. Now, Mr. Clark, please tell us what happened to you after you lay down on the ground. Who came to you first?

A. I think Mr. Gatti—no—let me see—Kline, I think. Next Kelley—John Kelley came.

Q. Who was it that took you home?

A. Gatti helped me to my gate and Kline also.

Q. How far was your gate from the place where you were found next to the track?

(Testimony of Thomas P. Clark.)

[192] A. About one hundred yards.

Q. Now, please tell us what your condition was so far as you know, immediately after the accident.

A. I know I was in great pain and all that—couldn't walk. I was pretty badly hurt. I endeavored to get up and couldn't do it. Mr. Gatti, I think it was—I think possibly Mr. Kline helped me to my feet and helped me down to my gate.

Q. Now, where did you feel pain at that time?

A. My back and hip was the worst.

Q. Was that the chief place?

A. The condition of my back and hip was what stopped me from getting up. Of course I was hurt other places, too.

Q. Now, what was the condition of your eye at that time? A. It was good up to that time.

Q. I mean immediately after the accident.

A. It was bruised up a little.

Q. Was there any blood on your face at all?

A. That is what they told me after I got home. I couldn't see myself.

Q. Have you any distinct recollection one way or the other as to that?

A. About the condition of my eye?

Q. Yes.

A. It closed up shortly after, and a day or two after I got it open and it was pretty near gone, and in two or three [193] days it was gone entirely.

Q. Which eye was it? A. The left eye.

Q. Do you recollect whether any blood came from your eye at all immediately after the accident?

(Testimony of Thomas P. Clark.)

Mr. KIBBEY.—We object to that as leading.

The WITNESS.—No.

The COURT.—That is leading.

The WITNESS.—Only what I was told.

(By Mr. SEABURY.)

Q. I only want your recollection. You say Gatti and Kline helped you part of the way home?

A. Yes, sir.

Q. Did they help you into the house?

A. No, I refused to let them go into the house. I thought I could get in myself and my wife came out and helped me.

Q. How far was it you walked yourself?

A. Not far. Only from the gate to the steps.

Q. What took place as soon as you got into the house? What did you do?

A. They took charge of me there—my wife did.

Q. Your wife took charge of you? A. Yes.

Q. What did you do—did you remain standing?

A. I laid down on the bed as soon as I got in.

[194] Q. You sat down on the bed?

A. On the cot.

Q. Did you undress and go to bed? A. No.

Q. What did you do?

A. Well, my wife got to work bathing—washing me off first. I don't think I took my clothes off until the doctor came.

Q. When did the doctor come?

A. He was there within an hour.

Q. Who was it? A. Dr. Dietrich.

Q. Who else came to attend you? A. Doctors?

(Testimony of Thomas P. Clark.)

Q. Yes. A. None.

Q. Did you have a nurse attend you?

A. Yes, sir.

Q. Who was it? A. Mrs. Manes.

Q. Rebecca Manes? A. Rebecca Manes.

Q. How long was she with you?

A. I think about eight days.

Q. During that time did you continue to suffer much pain? A. Always.

Q. Whereabouts?

[195] A. My chest, my rib, my hip, back of my head and eye.

Q. How long did any of these pains continue?

A. A month.

Q. Which of them continued for a month?

A. Some of them continues until to-day.

Q. Which of them continue until to-day?

A. This one (indicating chest), my ribs and my hip.

Q. Do you continue to have any pain in your eye?

A. Not very much. It is logy and bad and gummy in the morning, but the pain isn't very bad.

Q. Can you see anything out of that eye if you cover the other eye? A. No, sir.

Q. You can't see anything at all?

A. Not a thing.

Q. Did the eye continue to pain you continuously from the time of the accident?

Mr. BENNETT.—That is leading.

The COURT.—Yes.

Mr. BENNETT.—It simply amounts to counsel

(Testimony of Thomas P. Clark.)

testifying and the witness acquiescing.

The COURT.—The Court has ruled.

(By Mr. SEABURY.)

Q. Please tell us how long your eye continued to pain you.

A. For over a month it pained bad, and occasionally ever since.

[196] Q. How long were you confined to the house after the accident, do you recall?

A. I think about four weeks—three and a half weeks, say. I am not sure.

Q. How long were you under medical treatment?

A. For a month.

Q. How long had you been in the employ of the defendant company prior to the accident?

A. About thirteen years.

Q. During that time what, if any, illnesses had you had? A. None at all.

Q. Had you been engaged in work continuously for them for the period of thirteen years?

A. Yes, sir.

Q. Were there any occasions on which you were away on vacations or any other—

A. Nothing, only pleasure.

Q. How is that?

A. I used to take a vacation once a year for about a month to visit my home. That is all.

Q. I would like to know if you were obliged to stop work on account of ill-health at any time during that period of thirteen years. A. No, sir.

(Testimony of Thomas P. Clark.)

Q. At the time of the accident what wages were you earning?

[197] A. Estimated at one hundred and seventy-five dollars a month, twenty-eight days, or six dollars and a quarter a day for ten hours.

Q. How much a month?

A. One hundred and seventy-five dollars a month, and twenty-eight days made a month on the switch engine.

Q. Now, since the accident occurred, have you earned anything in the way of wages?

A. Have I what?

Q. Have you earned any wages since the accident occurred? A. No, sir.

Q. Have you done any work, Mr. Clark?

A. No, sir.

Q. Has your condition been such that you could do any work? A. I couldn't do any work.

Q. Are you still in that condition? A. Yes, sir.

Q. What, if any, sums of money have you spent for medical treatment and medicine since the occurrence of the accident? A. Since the accident?

Q. Yes.

A. I suppose two thousand dollars or more.

Q. For what was most of that sum paid out?

A. Well, it was paid out for doctors.

Q. To which doctors?

[198] A. Some in El Paso.

Q. Do you recollect any other items that you have disbursed in connection with your illness?

A. I don't understand.

(Testimony of Thomas P. Clark.)

Q. Do you recollect any other sums of money that you have spent out on account of your illness since your accident?

A. Nothing only my living—nothing coming in.

Q. Who made the payments, you or Mrs. Clark?

A. I made it.

Q. Is Mrs. Clark familiar with the moneys you paid out for medical attention? A. I think so.

Mr. McFARLAND.—I think that would be testifying to what she knows—hearsay.

The COURT.—No, I think not. She may have paid the money.

Mr. SEABURY.—He said she paid it.

Mr. McFARLAND.—No, he said, "I" paid it.

(By Mr. SEABURY.)

Q. Can you tell what these moneys were you paid out—to whom you paid them?

A. I paid them to the doctors.

Q. Who were the doctors?

A. Cathcart was one. One was Dr. Kendall, of El Paso.

Q. Do you remember how much you paid to Dr. Kendall of El Paso? A. Not much.

Q. Did you pay Dr. Dietrich anything?

[199] A. No, sir. That is, we didn't pay it; it was taken out of our wages.

Q. Who took the pay for Dr. Dietrich out of your pay? A. The company stopped it out of our pay.

Q. Which company?

A. The Arizona and New Mexico Railway Company.

(Testimony of Thomas P. Clark.)

Q. The defendant in this action? Do you know how much of your pay went to that doctor for his services to you?

A. No, sir, I don't know how much went to the doctor for my particular services.

(By the COURT.)

Q. Was he paid by so much a month contributed by all the employees? A. Yes, sir.

(By Mr. SEABURY.)

Q. So he was your doctor at that time?

A. Yes, sir.

Q. What other doctors did you make any payments to, if any? A. Dr. Fayles.

Q. Do you recall how much you paid to him?

A. Something over two hundred dollars.

Q. Were these expenditures that you made necessary in connection with your illness? A. Yes, sir.

Q. Did you regard them reasonable for what services you received?

A. I thought they were very reasonable.

[200] Q. Mr. Clark, when you fell from the engine, what part of your body did you strike on, do you recall?

A. I struck on this side here (indicating left shoulder and back of head). My left shoulder and back of my head and my hip.

Q. Your left shoulder and your back and hip?

A. Yes, sir.

Q. What was your condition immediately after the fall? Were you conscious or unconscious?

A. I was conscious.

(Testimony of Thomas P. Clark.)

Q. Did you feel like yourself, or how did you feel?

A. Pretty badly hurt.

Q. Just describe briefly your sensations at that time.

A. I was in awful pain, I know. Couldn't breathe hardly and couldn't move much. It was with difficulty that I could move at all on account of pain—couldn't hardly breath.

Q. Have you ever had any accident or injury to your person since that time?

A. Since that accident?

Q. Yes. A. No, sir.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say you have been in the employ of the Arizona and New Mexico Railway for about thirteen years? A. Yes, sir.

Q. Up to that time—the time of the accident?

[201] A. Yes, sir.

Q. During that term of service in what capacity were you employed? A. Locomotive engineer.

Q. All the time? A. All the time.

Q. In the yards or on the main line?

A. On the main line and in the yard too—both. Mostly on the main line.

Q. Well, for about five years immediately preceding the accident, where were you working?

A. I was on the Arizona and New Mexico Railway.

Q. As to the yards or main line?

(Testimony of Thomas P. Clark.)

A. Main line, I think. I can't remember without dates.

Q. How long were you on the switch engine?

A. Two years.

Q. Continuously on the switch engine?

A. Well, I had been on the main line in the mean time.

Q. But the larger part of the time for the two years immediately before the accident you were engaged as engineer on the switch engine?

A. Yes, sir.

Q. And your duties required you to switch cars up the Shannon hill? A. Yes, sir.

Q. You did that almost every day, didn't you?

A. I presume every day.

[202] Q. And sometimes twice a day?

A. And more times than that, too.

Q. During that time how many cars would you probably switch up Shannon hill in a day?

A. Sometimes we would take up as much as twenty —some days not over eight or ten.

Q. If that was as many as eight to twenty, would you say there would be an average of fifteen cars a day? A. Yes, about that.

Q. That would be four hundred and fifty cars a month, wouldn't it?

A. Oh, I don't know, I never estimated it—about that, I guess.

Q. Nearly five thousand cars a year?

A. You can figure it up. I don't know what it would be.

(Testimony of Thomas P. Clark.)

Q. Approximately ten thousand cars in two years.

Mr. SEABURY.—We object to the question.

The COURT.—Yes, that is a matter of computation.

(By Mr. McFARLAND.)

Q. Now, Mr. Clark, during that two years that you switched cars, that you were on the switch engine that switched cars up Shannon hill, the cars were left on the main line, were they not, before switching?

A. Yes, sir.

Q. What condition were they left on the main line?

A. Cut off and left standing.

Q. No brakes set?

[203] A. Ought to be, but they were not.

Q. As a matter of fact, there never was any brakes set on cars left on the main line when switching up Shannon hill?

Mr. SEABURY.—We object to the question on the ground that it is incompetent, irrelevant and immaterial. The witness can't be expected to know the condition of every car in ten thousand.

The COURT.—He can state what he knows.

Mr. SEABURY.—We ask that the question be limited to what he knows.

(Thereupon the reporter reads the following question: Q. As a matter of fact, there never was any brakes set on cars left on the main line when switching up Shannon hill?)

Mr. SEABURY.—We object again—not confined to his knowledge.

(Testimony of Thomas P. Clark.)

(By Mr. McFARLAND.)

Q. Well, then, the two years you were engineer in charge of the switch engine—

Mr. SEABURY.—We object to the question—it is not a proper question.

The COURT.—It is still objectionable in that respect. He can't be presumed to have known unless he was there and present.

(By Mr. McFARLAND.)

Q. So far as you know, during the two years you were engineer on the switching engine, were the brakes set upon the cars left standing on the main line before being switched up Shannon switch?

[204] A. As far as I know there was not any brakes set on them at all.

Q. That was true during the entire two years that you had charge of the switch engine?

A. Yes, sir.

Q. As I understand you, it was the method pursued down there in switching cars from the main line up the Shannon switch to leave them on the main line without brakes being set?

Mr. SEABURY.—We object to the question. I don't think the witness has testified as to that. We object to its competency and to its materiality. Nothing to do with this particular accident or how it occurred.

Mr. McFARLAND.—It may be very material.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

(Thereupon the reporter reads the following ques-

(Testimony of Thomas P. Clark.)

tion: Q. As I understand you, it was the method pursued down there in switching cars from the main line up the Shannon switch to leave them on the main line without brakes being set?)

The WITNESS.—They were left on the main line, but I wouldn't say whether the brakes were set or not. It was not my business to know.

(By Mr. McFARLAND.)

Q. There were brakes set so far as you know?

A. No, sir.

Q. Where were these cars brought from on the main line [205] on the day of the accident?

A. Where were they brought from?

Q. Yes. A. What we call Hill's flat.

Q. That is a short distance east of the point where the accident happened? A. Yes, sir.

Q. Now, what time a day was it?

A. About nine o'clock in the morning we went after them and pulled them over.

Q. About nine in the morning? A. Yes, sir.

Q. Had those cars set there the night previous?

A. I don't know—I presume they had.

Q. You found them there in the morning when you went there? A. Yes, sir.

Q. How far did you pull them from Hill's flat up to and on the main line in front of the Shannon store?

A. We pulled them so that eight of the cars would remain on the main track south of the Shannon crossing, and cut them off.

Q. Was the first cut you made there?

(Testimony of Thomas P. Clark.)

A. We left the eight there and went up Shannon with the other four.

Q. Was the first cut you made south of the road crossing [206] the track at or near in front of the Shannon store? A. Yes, sir.

Q. Then you took those eight up the main line past the switch and then backed them up the Shannon switch?

A. No, sir, we left eight cars south of the Shannon crossing and went up on the Shannon hill with four.

Q. That is what I speak about—the first four.

A. Yes.

Q. Now, when you were coming up Shannon hill were the eight cars where you made the first cut?

A. Yes, sir.

Q. They hadn't moved so far as you know?

A. No, sir.

Q. Then you pulled those eight cars down toward Shannon switch? A. Yes, sir.

Q. How far?

A. Pulled them across the Shannon crossing all together and up so that four would clear the Shannon switch.

Q. That is the four that remained or the four that you took away?

A. So that the four we cut off were left there so that they would clear the switch.

Q. Would clear the Shannon switch?

A. Yes, sir.

Q. That is so they would not collide with the train going up Shannon switch? [207] A. Yes, sir.

(Testimony of Thomas P. Clark.)

Q. How far were those four cars left from the Shannon switch?

A. In to clear Shannon switch probably one hundred feet.

Q. Then it would be one hundred feet south of Shannon switch?

A. Of the switch, but not one hundred feet south of where they would clear.

Q. I am speaking about the switch.

A. Yes, the switch.

Q. The frog is still south of the switch?

A. Yes, sir.

Q. How far south?

A. I don't know just what the lead of them tracks is. Oh, I should say maybe sixty feet.

Q. Then the cars would be forty feet again south of the frog? A. Yes, sir.

Q. You are satisfied that is about the position you left the last four cars—about forty feet south of the frog? A. Yes, sir, about.

Q. When you took the second four cars you pulled them up the main track past the switch and up towards the point of rocks? A. The second four?

Q. Yes. [208] A. Yes, sir.

Q. And then backed up the main line up to the Shannon switch and then got part way up the Shannon switch? A. Yes, sir.

Q. While you were backing those cars up—the second four cars—did you get any signal to stop?

A. Yes, sir.

Q. Where was your engine when you got that sig-

(Testimony of Thomas P. Clark.)

nal? A. Where was the engine?

Q. Yes. A. Approaching the frog.

Q. How far? A. Just passing the switch.

Q. That would put within about sixty feet of the frog? You say the frog was sixty feet south of the switch? A. Yes.

Q. And you are quite sure you didn't get that signal until your engine had got to the switch?

A. Past the switch.

Q. Past the switch?

A. Just to the switch—about there.

Q. That was sixty feet from the frog?

A. Yes, sir.

Q. Did you make any effort at that time to stop the train? A. Yes, sir.

Q. What did you do?

A. Applied the air with full force.

[209] Q. Did you do anything else?

A. I couldn't do anything else—shut off the steam and applied the air—couldn't do anything else.

Q. Then that would be about sixty feet from the point where you applied the air to the place where the collision occurred? A. About that.

Q. Could it have been more?

A. That is near enough.

Q. Couldn't be less? A. That is near enough.

Q. At what rate of speed were you running?

A. About six miles an hour.

Q. Do you know what distance that engine and the train of cars on that grade could be stopped, running at six miles an hour? A. Yes, about.

(Testimony of Thomas P. Clark.)

Q. What? A. About.

Q. What distance? A. Sixty or eighty feet.

Q. Sixty or eighty feet?

A. You are speaking about the engine?

Q. Yes, speaking about the engine. In what distance could [210] the train be stopped going six miles an hour upon the application of air as you say you made it—going six miles an hour?

A. I couldn't do much with that. Here is a couple of hundred—three or four hundred tons—there was no braking power on those four cars—the engine alone was all.

Q. If you had applied the air as you say you did on getting that signal at the point you were, couldn't you have stopped that train within seventy feet?

A. No, sir.

Q. What distance would it require for you to stop it with the air on the engine and no brakes being set on the other four cars?

A. I never used the brakes on the other four cars.

Q. Assuming that there were no brakes on the other four cars. That they were simply loose. The only power you had was your engine?

A. That is all.

Q. Now, in what distance could you stop that train with the engine by the direct application of air, the engine going six miles an hour?

A. In a hundred and fifty feet.

Q. No less? A. No.

Q. You couldn't have stopped in seventy feet?

A. Seventy feet?

(Testimony of Thomas P. Clark.)

Q. Yes. A. I don't think so.

[211] Q. If you could do it and had done it you would not have had this collision?

A. Oh, yes, we would.

Q. In seventy feet? A. You say seventy feet?

Q. Yes.

A. Oh, yes, we would. Couldn't stop it in time for that.

Q. In other words, you say you couldn't stop that train in seventy feet? A. No, sir.

Q. Did you take any particular notice at what point you were when you got that signal?

A. We were close to the frog.

Q. Close to it? A. Yes.

Q. Well, how far were you from it—close on to it is rather indefinite? A. Twenty-five feet, maybe.

Q. Five feet? A. Twenty-five feet.

Q. Twenty-five feet from the frog when you got that signal? A. Yes, sir.

Q. Didn't you say a while ago that your engine was at the switch when you got that signal?

A. I said it was between the switch and the frog—that is about where it was.

Q. Didn't you say it was at the switch?

[212] A. No, I don't think I did.

Q. Didn't you say that you had just got on the switch? A. Did I say that?

Q. I say didn't you say that—I am asking you?

A. I guess I said between the switch and the frog—closer to the switch, probably.

Q. And by the application of straight air you

(Testimony of Thomas P. Clark.)

couldn't have stopped that train before the collision occurred? A. No, sir.

Q. Now, it is some little distance south of the frog where the collision occurred, wasn't it?

A. South of the frog?

Q. Yes. A. Yes, sir.

Q. How many feet? A. Probably ten.

Q. No more? A. About that.

Q. About ten feet? A. Yes.

Q. Now, if your engine was at the switch, and it is sixty feet from the switch to the frog and ten feet from the frog to where the collision occurred, that is seventy feet. Now, do you undertake to say that you could not have stopped that train by the application of direct air, in seventy feet?

[213] A. That is what I say.

Q. Impossible? A. Yes, sir.

Q. It couldn't be done? A. No, sir.

Q. Was there any perceptible slackening of the speed of your engine or that train after you got the signal and before the collision?

A. Yes, there was.

Q. To what extent was that true?

A. We were almost stopped.

Q. What?

A. We got down to three or four miles an hour.

Q. So that when the collision occurred your train was going about three miles an hour?

A. About that—four, maybe.

Q. Now, what was your position on the engine when you got this washout signal?

(Testimony of Thomas P. Clark.)

A. I was at my post on the right side.

Q. Which way was your face?

A. Facing south.

Q. Your face was toward the south?

A. Yes, sir.

Q. When you got the signal? A. Yes, sir.

Q. Now, wasn't the window just in front of you in the cab?

[214] A. There was a window way—no window.

Q. Perfectly open? A. Yes.

Q. Couldn't you see down that line of cars from that window? A. No, sir.

Q. You couldn't? A. No, sir.

Q. Wouldn't that window enable you to see on the outside of the cars just in front of you on the train?

A. On the opposite side?

Q. No, on the same side. A. No, sir.

Q. You can't see from your cab down the side of the train at all?

A. No, sir, not on this occasion.

Q. Why not?

A. Because of the cars behind the tender.

Q. Were those cars the same width as the cab of your engine? A. About.

Q. So the cars filled out flush with the engine and obstructed your view? A. Yes, sir.

Q. That is true, is it? There wasn't space enough at that window to let you see down that train of cars in the direction you were going?

[215] A. No, sir.

Q. You say the width of that cab was practically

(Testimony of Thomas P. Clark.)

the same as the width of the freight-cars in front of you? A. Yes, sir.

Q. Practically no difference?

A. I never measured to a fractional part of an inch, but it is estimated about the width of a box or stock-car.

Q. Isn't the cab of the engine wider?

A. Not usually. It is occasionally narrower.

Q. That particular engine?

A. That is about the same width as a box-car.

Q. As a matter of fact, isn't that cab about ten inches wider than an ordinary box-car?

A. No, sir.

Q. If it was, could you have seen out of that window down that line of cars?

A. There was a box-car right behind the tender that stopped me from seeing anything.

Q. If the cab was ten inches wider than that car, that would give you five inches on that side of space wider than the box-cars. If that is true couldn't you have seen down that line of cars? A. No, sir.

Q. Why not?

A. Because the curve took it away from me.

Q. You say you paid Dr. Dietrich. Did I understand you to say that? A. Yes.

[216] Q. Didn't you get what pay, if any—or didn't you pay, if anything at all—wasn't the payment, if any was made at all, out of the benevolent association? A. Didn't I pay out of that?

Q. No, wasn't it paid by the benevolent association—anything paid on account of Dr. Dietrich?

(Testimony of Thomas P. Clark.)

A. I don't know what they done with the money after they took it out of our pay.

Q. You mean to say that you contributed monthly each month? A. Yes, sir.

Q. It was that money you paid? A. No.

Q. Did they take any money out of your pocket and give it to Dr. Dietrich?

A. Not to Dr. Dietrich; no, sir.

Q. Didn't you contribute monthly so much toward the hospital fund—hospital dues?

A. Didn't I contribute?

Q. Yes. A. I did for years.

Q. Now, it was out of that fund that it was paid, wasn't it? That Dr. Dietrich was paid, if he was paid at all?

A. I don't know whether Dr. Dietrich was paid at all. I don't know anything about it.

Q. You didn't pay anything yourself?

A. Only what was taken out of my pay. I didn't go into my pocket.

[217] By the COURT.—Was anything taken out of your pay after the accident?

The WITNESS.—No, sir. I never received any pay.

(By Mr. McFARLAND.)

Q. Wasn't it true that all the employees of the Arizona and New Mexico Railway Company contributed monthly to the benefit fund?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial and not proper cross-examination.

(Testimony of Thomas P. Clark.)

The COURT.—I think so. There is testimony before the jury that he has expended something like two thousand dollars in payment of doctor bills and so forth—a general statement to that effect. He stated Dr. Dietrich was paid and some other physicians. The question is whether he paid anything to Dr. Dietrich for which he may recover in this suit.

Mr. SEABURY.—That is not the question to which I object. The questioning continues: "Isn't it a fact other employees of this road made the same contribution to this hospital fund that you made?" It is incompetent, irrelevant and immaterial to this case.

Mr. McFARLAND.—That is to get at the fact of payment.

Mr. SEABURY.—We understand the fact of payment—no dispute about that.

The COURT.—Wouldn't it make a difference as to the recovery in this case? If he hasn't expended anything by virtue of this accident, he cannot recover it.

[218] Mr. SEABURY.—Certainly not, but that can't affect contributions other employees made.

The COURT.—It is clearing up the statement he made as to the character of the payment made to Dr. Dietrich.

Mr. KIBBEY.—That is it, your Honor.

The COURT.—I understand that he is paid just as physicians of mining companies are frequently paid, out of some company fund to which the employees contribute. I take that to be the case here,

(Testimony of Thomas P. Clark.)
and if that has sufficiently developed, that is sufficient. You don't claim anything by virtue of any payment made to Dr. Dietrich?

Mr. SEABURY.—No, your Honor, not by way of recovery.

The COURT.—He said it came out of his pay. That is the thing that ought to be cleared up, and I understand that it is cleared up.

Mr. SEABURY.—Do I understand the question is allowed?

The COURT.—It is withdrawn, I understand.

Mr. SEABURY.—I didn't hear its withdrawal.

The COURT.—It is withdrawn, is it, Mr. McFarland?

Mr. McFARLAND.—Yes. It is only to show how this was done.

(To the witness.)

Q. Now, Mr. Clark, you say you paid out certain sums of money on account of medical treatment for these injuries, and I understood you to say you paid out about two thousand dollars.

A. Not directly for medicine, of course, or for doctors, [219] but my expenses and like of that would amount to that.

Q. How much have you paid to doctors?

A. Well, I would have to go back and hunt it up.

Q. I don't understand you.

A. I would have to figure it up.

Q. You said you paid Dr. Fayles two hundred dollars? A. Yes, sir.

Q. For treatment on account of the injuries?

(Testimony of Thomas P. Clark.)

A. Yes, sir.

Q. Now, who else did you pay any money to?

A. I paid for treatment to scientists in Texas.

Q. When—who was it you paid it to—in Los Angeles or El Paso?

A. I paid some to Dr. Kendall.

Q. How much did you pay Dr. Kendall?

A. To get my eye treated.

Q. How much?

A. Some twelve or fifteen dollars.

Q. Who else? What other doctor?

A. Cathcart.

Q. Where does he live? A. In El Paso.

Q. What did you pay him?

A. I don't know—probably fifty dollars.

Q. Now, what other physician did you pay?

A. Ah, that is all now.

Q. What? [220] A. That is all now.

Q. Twelve or fifteen dollars to Dr. Kendall, two hundred dollars to Dr. Fayles and fifty dollars to Dr. Cathcart. Did you have any conversation with Dr. Kendall while he was treating you? At El Paso?

A. I was there to get my eye treated. We had a business conversation probably.

Q. Did you have any conversation about your eye?

A. He treated it.

Mr. SEABURY.—We object to the question on the ground that it is not proper cross-examination.

The COURT.—The objection is overruled. They may be laying the foundation for an impeaching question.

(Testimony of Thomas P. Clark.)

(By Mr. McFARLAND.)

Q. Did you have any conversation about your eye?

A. I went to have it doctored—repaired.

Q. Did he examine your eye? A. Yes, sir.

Q. Did he give you a certificate that you would not see any more out of that eye?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. McFARLAND.)

Q. Did you tell him how the accident occurred?

A. I didn't tell him anything about it.

Q. The result of which you lost your vision of one eye?

The COURT.—Is this to lay a foundation for a contradictory statement?

[221] Mr. McFARLAND.—I don't have to do that.

The COURT.—Ordinarily you do if you are going into an examination of this kind, with reference to his conversation after the injury.

Mr. McFARLAND.—Not with the party to the suit. With another witness you would have to *pay* the ground for impeachment.

The COURT.—I don't understand there is any difference as to that. I think the rule is, certainly the rule we have applied in the territorial courts, that cross-examination is restricted to matters drawn out on direct examination even in the case of parties to the suit, although some liberality is exercised in that respect. But in general the rule is that you confine

(Testimony of Thomas P. Clark.)

your examination to something brought out on direct examination.

Mr. KIBBEY.—With a party we may go into any part of the plaintiff's case.

The COURT.—If he testified to the cause of action, you may go into anything touching the cause of action, but conversations subsequent to the transaction itself is a different thing altogether.

Mr. SEABURY.—We desire to show in this case that the person with whom this person is supposed to have had the conversation is his doctor and that the conversation took place during the existence of the protected relation, and therefore [222] the witness is incompetent to testify, and we wish to rely on that relation to exclude this testimony.

The COURT.—You don't think the other point is good, then?

Mr. SEABURY.—I think they are both good, your Honor, but the question is, did you have a conversation; if so what was the conversation? It is impossible to tell before hearing the conversation whether it is covered by the rule.

The COURT.—It is possible that he may have made some admission in the hearing of a third party, but I think still that the evidence is incompetent on the ground that it is not proper cross-examination, unless it is for the purpose of laying the ground for an impeaching question.

Mr. McFARLAND.—The difficulty of that is that he testified this party treated him and he paid him ten or fifteen dollars for the treatment. Now, I don't

(Testimony of Thomas P. Clark.)
know whether Dr. Kendall is a physician or not—I don't know whether he is a licensed practitioner.

The COURT.—It may be inquired about, but this is something in relation to a conversation the witness had in regard to his eye. The objection is sustained.

Mr. McFARLAND.—It is very material, for we can't introduce admissions against interest without laying the foundation. In view of the ruling of the Court—

The COURT.—I understood you to say it was not your purpose to show contradictory statements by this witness.

Mr. McFARLAND.—I don't know any other way to lay the foundation but this.

[223] The COURT.—It is proper to bring out statements from this witness so that they may be contradicted, if he has stated to the doctor or anyone else matters with reference to his condition or the condition of his eye contradictory to anything he has already testified to. That may be shown, provided by showing it you do not violate the rule as to confidential communications. That I understand you to say you do not aver now. The objection is sustained.

Mr. McFARLAND.—Just a moment, if your Honor please.

(To the witness.)

Q. I ask you this question and do not want you to answer until the counsel has an opportunity to object. When this gentleman, Mr. Kendall, was treating you in El Paso, didn't you ask him for an opin-

(Testimony of Thomas P. Clark.)

ion as to whether or not from the condition that your eye was then in, if he would not give you a certificate that you lost that sight in this accident, and whether he didn't reply—

Mr. SEABURY.—We object to counsel stating the alleged reply and in that way getting the substance of the answer before the jury.

Mr. McFARLAND.—I can't do it any other way.

Mr. KIBBEY.—He can ask what the conversation was that he had and ask him to state the conversation, which is perfectly proper on cross-examination.

The COURT.—That might or might not be the case. If this evidence is admissible he may put the question whether he did not at a certain time and place state a certain thing. It would be improper, however, I think, for the witness under any circumstances to state what this man may have replied as to [224] what Dr. Kendall said, except as a necessary part of the statement that the witness may have said.

Mr. McFARLAND.—That is true, and we limit our question to that.

Mr. SEABURY.—I ask that counsel be asked to put another question.

The COURT.—I don't think the Court can do that. The mere fact that it may contain a suggestion you say is not enough to exclude it. The jury should be cautioned, perhaps, not to take for granted anything put into a question in a hypothetical way.

Mr. SEABURY.—I desire to object further that it is not in proper form as now presented.

The COURT.—The question was not finished in its

(Testimony of Thomas P. Clark.)
present form. You may state it again.

Mr. McFARLAND.—Will the reporter please read the question?

(Thereupon the reporter reads the following question: 1. I ask you this question and do not want you to answer until the counsel has an opportunity to object. When this gentleman, Mr. Kendall, was treating you in El Paso, didn't you ask him for an opinion as to whether or not from the condition that your eye was then in, if he would not give you a certificate that you lost that sight in this accident, and whether he didn't reply—)

Mr. McFARLAND.—(Finishing the question.) —by saying that he did not believe its vision was lost in the accident—the vision of that eye was lost in the accident.

Mr. SEABURY.—We object to the question as incompetent, [225] irrelevant and immaterial and not proper in form.

The COURT.—Is that all the conversation?

Mr. McFARLAND.—Yes.

Mr. SEABURY.—I also desire to prove if I can that Kendall was a physician or surgeon and treating him in that capacity.

The COURT.—Prove what?

Mr. SEABURY.—That the person with whom he was having the conversation was consulted by him professionally as an oculist or doctor, and if this conversation or talk did take place it related to a conversation between patient and physician and as such was privileged under section six, paragraph 2535,

(Testimony of Thomas P. Clark.)

Arizona Revised Statutes of 1901.

The COURT.—How do you answer that contention?

Mr. McFARLAND.—I don't know that he is a physician.

The COURT.—Your question assumes it.

Mr. McFARLAND.—It is a conversation between these two people. Now, as a matter of fact, I think I can truthfully state to the Court that he is not a practitioner, not an optician.

The COURT.—You are not a witness as yet—you are not a witness on the subject.

Mr. McFARLAND.—The Court asks me that question and I give that reply.

The COURT.—Your question assumes the existence of that relation, it seems to me. The objection is sustained. I think it is improper.

Mr. McFARLAND.—We except.

[226] (To the witness.)

Q. Did you report to Mr. Thompson after that accident at any time that you were all right and ready to go to work? A. No, sir.

Q. You never did? A. No, sir.

Q. Didn't you ask to be reinstated in your position as engineer of the switch engine? A. No, sir.

Q. You never offered to go back to work?

A. No, sir. I gave them a proposition of an agreement of what I would accept, and he would not discuss the matter.

Q. Wasn't that a proposition to go back to work on the switch engine?

(Testimony of Thomas P. Clark.)

A. It was a proposition when I was able, yes. I didn't report for work.

Q. Wasn't it a proposition to go back on the switch engine then?

A. Simply an option on the switch engine is all.

Q. He offered to put you on the slag engine and you would not accept?

A. I couldn't. I wasn't able to work.

Q. Didn't you tell him that if he would *put on* the switch engine you would go back to work at once?

A. No, sir.

Q. Wasn't that within two months after the accident? [227] A. No, sir.

Q. What time was it?

A. I don't know as it happened at all.

Q. You never talked to him about going back to work?

A. I made him a proposition there when I was able —I just simply came for a talk and he wouldn't talk to me.

Q. Nothing said in that conversation about going back to work on the switch engine at all?

A. No, sir.

Q. Was nothing said in that conversation about the company giving you some position on the slag engine? A. They offered that, I believe.

Q. You say that they did or did not offer it?

A. They offered me the slag engine.

Q. What wages? A. I don't remember.

Q. The same as you were getting on the switch engine? A. Yes.

(Testimony of Thomas P. Clark.)

Q. That was how long after the accident?

A. Four months.

Q. Didn't you offer to go back then and there if they would give you the switch engine, but wouldn't go back to work on the slag engine?

A. The slag engine job didn't exist at all—wasn't nothing of it—hadn't been running for some time.

Q. Didn't they offer you a hundred and seventy-five dollars a month to run that as engineer?

A. Yes, but it didn't run.

[228] Q. What difference did it make to you if they gave you a hundred and seventy-five dollars a month?

A. It would make a difference of a hundred and seventy-five dollars if I didn't work.

Q. If they gave you a hundred and seventy-five dollars a month it didn't make any difference how often you worked, did it?

A. They didn't offer that—they didn't offer anything.

Q. Did the company have any rules governing the transaction of their business in the operation of their trains? A. Yes, sir.

Q. Did you have one of those books?

A. Yes, sir.

Q. Did you know what the rules were?

A. Yes, sir.

Q. You had one of those books at the time of the accident? A. Yes, sir.

Q. And had had it for a good long while before?

A. Yes, sir.

(Testimony of Thomas P. Clark.)

Q. And knew what the rules were? A. Yes, sir.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. KEARNEY.)

Q. What is the length of defendant's railroad? Between what points does it run to?

A. From Clifton, Arizona, to Hachita, New Mexico.

[229] Q. What distance is that?

A. About one hundred and nine miles.

Recross-examination.

(By Mr. McFARLAND.)

Q. I ask you if about a month after the accident—probably a month or six weeks—if you didn't report to Mr. Reissinger, the superintendent of the road, that you were all right and ready to go to work?

A. No, sir.

Q. You never had that conversation with him at all? A. With superintendent Reissinger?

Q. Yes.

A. I never mentioned anything about the accident to him.

Q. And never had any conversation with him at all? A. No, sir.

Q. At no time? A. After the accident?

Q. Yes. A. No, sir, not after the accident.

Mr. McFARLAND.—That is all.

(Witness excused.)

[Testimony of Louis Dysart, for Plaintiff.]

LOUIS DYSART, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Doctor?

A. Louis Dysart.

[230] Q. What is your profession, Doctor?

A. Physician and surgeon.

Q. How long have you been engaged in that profession? A. Seventeen years and a half.

Q. Where do you practice?

A. In Phoenix, Arizona.

Q. How long have you practiced in Phoenix, Arizona? A. Eight years.

Q. Please state what medical education you have had.

A. I am a graduate of the College of Physicians and Surgeons of Chicago, ex-interne of Cook County Hospital, Chicago, and served for a year and half in charge of the Mexican Central Hospital at Tampico, Old Mexico, and three years and a half as surgeon at Chemulpo for the same company, and two years for the Copper Queen Company and the El Paso and Southwestern at Bisbee.

Q. And during all that time you were engaged in general practice? A. Yes, sir.

Q. Did you, during that time, come in contact much or little with cases of personal injuries?

A. A great many cases; yes, sir.

(Testimony of Louis Dysart.)

Q. Do you know the plaintiff in this case, Thomas P. Clark? A. Yes, sir.

Q. When did you first meet him?

A. It was November 5th.

[231] Q. Of what year? A. Of this year.

Q. Where did you see him? A. At my office.

Q. Did you examine him at your office then or shortly after? A. Yes, sir.

Q. Who was present when you examined him, Doctor?

A. Dr. Craig was present and Dr. Brownfield, and his wife was there part of the time.

Q. That is Mrs. Clark?

A. Yes, sir; Mrs. Clark.

Q. Now, Doctor, will you please tell us what the examination was that you made—what it included? Tell us all about it.

A. I made an examination of the chest and of the spine and of the head, and an examination of the urine and a test of the blood pressure.

Q. What did you find was the condition around the chest?

A. I found that there was an irregularity in the third and fourth ribs on the right side in front, and found some tenderness over the lower ribs on the left side—the eleventh or twelfth.

Q. Did the examination of that part disclose whether or not there had been any fracture of the ribs?

A. The third and fourth ribs on the right side had undoubtedly been fractured.

(Testimony of Louis Dysart.)

[232] Q. Could you tell whether it was an old fracture or a recent one?

A. It was an old fracture.

Q. By that you couldn't estimate, could you, about when the fracture occurred?

A. Well, I would say that it had not occurred within the last month or six weeks; that it was longer ago than that.

Q. Do you say there was still some tenderness present in that neighborhood on the left side?

A. Yes, sir.

Q. What did you find in reference to his spine and back, if anything?

A. I found no displacement of any of the bones of the spine. There was some tenderness along the spine.

Q. What did you find in reference to his head, if anything?

A. The head outside of the eye was negative—I found nothing.

Q. What did you find with reference to his urine?

A. The urine contained albumen and tibe casts.

Q. What does that indicate?

A. An inflammation of the kidneys.

Q. What, if any, trouble did you find him to be suffering from at this time?

A. He was suffering from Bright's disease.

Q. Advanced or otherwise?

A. Chronic Bright's disease.

Q. What did you find with reference to his blood pressure?

(Testimony of Louis Dysart.)

[233] A. The blood pressure was increased—it was higher than it should be.

Q. What was it, do you recall?

A. Two hundred and twenty millimeters of mercury. That is, sufficiently high to support a column of mercury two hundred and twenty millimeters high.

Q. What would be the normal blood pressure in a man of sixty-five or sixty-seven years of age?

A. From one hundred and fifteen to one hundred and thirty or possibly thirty-five.

Q. What does that increased blood pressure indicate, Doctor?

A. It is a condition that goes with an inflammation of the kidneys—with chronic Bright's disease.

Q. Directly attributable to that, is it?

A. Yes, sir.

Q. Are you familiar, Doctor, with the ordinary probability of life of a man sixty-five years of age, if he is well and has been able to work continuously for a period of thirteen years prior to an injury?

A. Yes, sir.

Q. What would you say the probability of life is in such a case?

[234] A. Very close to eleven years.

Q. About eleven years? A. Yes, sir.

Q. What would you say are the inducing causes of Bright's disease?

A. The cause of Bright's disease are the specific fevers, poisoning by lead or any other metallic poisons, syphilis, exposure to cold. Those are about

(Testimony of Louis Dysart.)

the only causes.

Q. Will you enumerate the specific fevers?

A. Scarlet fever, smallpox, rheumatism, pneumonia, typhoid fever, mumps and measles. I believe I mentioned scarlet fever.

Q. Can you say that Bright's disease is the ordinary and probable result of any one of these specific fevers?

A. It frequently results as due to these fevers.

Q. With what frequency would you say Bright's disease would result from pneumonia?

A. Changes are found in the kidneys of those dying from pneumonia in close to twenty-five per cent of the cases. The cases which die are presumably the more severe cases and would be complicated by nephritis in more cases than those that get well. Probably ten to fifteen per cent of the cases of pneumonia would show inflammation in the kidneys. About forty per cent of pneumonia cases die. So I would say in all cases of pneumonia there would probably be between ten to fifteen per cent showing inflammation of the kidney.

Q. Which is Bright's disease? A. Yes, sir.

Q. Is Bright's disease the same thing as nephritis? A. Yes, sir; that is what it means.

Q. Nephritis is the same thing as Bright's disease? [235] A. Yes, sir.

Q. Now, Doctor, assuming that the plaintiff in this case received a severe injury in March, 1911; that at that time he was about sixty-five years of age; that for thirteen years immediately prior to

(Testimony of Louis Dysart.)

the accident he had continuously worked as locomotive engineer, except such times as he had been absent for vacations; that during the entire period of thirteen years' service he had not lost a day's work by reason of illness; that on the 15th day of March, 1911, he was thrown from an engine on to the ground as the result of a severe impact of cars; that he struck the back of his head; that he struck the back of his left shoulder and his hip; that within two days thereafter pneumonia developed; that thereafter he became cured of his pneumonia; could you say with reasonable certainty that the condition of nephritis which you found him to be suffering from when you examined him in November, 1912, was the natural and probable result of that pneumonia?

A. There would be a reasonable probability that his nephritis—inflammation of the kidneys—came as a result of the pneumonia. That would be the reasonable conclusion.

Q. Did you make any extended examination of the plaintiff's eye in November, 1912, when you saw him?

A. I was with Dr. Brownfield when he examined the eye.

Q. Did you see the various tests that Dr. Brownfield applied to him to ascertain whether he had vision or not?

A. I saw a good many of them, not all.

Q. Did you make such an examination as would enable you to say whether or not the plaintiff has any vision in his left eye at the present time?

(Testimony of Louis Dysart.)

A. Yes, sir.

[236] Q. What would you say in reference to that matter? Has he or has he not?

A. The eye is blind.

Q. You mean by that that he cannot see at all out of it? Has he any sight at all left in that eye?

A. He can see, possibly, light which would amount to the amount of light that he could—with the eye open—which he might see with the other eye with the lid closed.

Q. And about what degree of light would that be?

A. A strong light he could possible perceive—tell the difference between that and absolute darkness.

Q. Could he, however, distinguish any objects?

A. No objects.

Q. Would the intensity of light make any difference with the ability to distinguish any objects with that eye? A. We tested with strong light.

Q. And you found him to be totally blind?

A. Totally blind; yes, sir.

Q. Was your examination sufficient to enable you to say with reasonable certainty whether that condition of blindness was the natural and probable result of the shock to the plaintiff's head on March 15th, 1911?

A. My part of the examination was not such as would determine that point.

Q. I think that is all.

Mr. KIBBEY.—We don't want to ask the doctor any questions.

(Witness excused.)

The COURT.—We will take a recess until nine-thirty to-morrow morning, and meanwhile the jury will bear in mind the admonition of the Court not to talk to anyone about the case.

(Thereupon the Court takes a recess.)

[237] Thursday, November 14, 1912.

At nine thirty-five A. M. this day, the plaintiff being present in person and represented by his counsel, and the defendant being present by its counsel, the jurors come into court and are called by the Clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

[Testimony of Robert R. Brownfield, for Plaintiff.]

ROBERT R. BROWNFIELD, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Doctor?

A. Robert R. Brownfield.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been engaged in that profession? A. Nine years and a fraction.

Q. Where do you now practice?

A. In Phoenix, Arizona.

Q. Will you tell us, please, what preliminary education you have had in your profession?

A. State University of Nebraska, State Univer-

sity of Kansas, one year with Dr. ——— in special study—

Q. Where was that?

(Testimony of Robert R. Brownfield.)

A. Kansas City, Missouri. New York Polyclinic, New York City.

Q. Have you made a specialty of any study connected with the eyes? A. I have.

Q. Is it part of your profession as physician and surgeon [238] to treat the eye?

A. I made a specialty of diseases of the eye, ear, nose, and throat.

Q. Do you know the plaintiff in this action, Thomas P. Clark? A. Yes, sir.

Q. Have you examined him at any time?

A. Yes, sir.

Q. When did you examine him?

A. I think it was the sixth of this month.

Q. 1912? A. Yes, sir.

Q. With whom did you examine him, if anyone?

A. Dr. Dysart was present when I examined him.

Q. Will you please tell us how you examined him and what you did in connection with your examination?

A. I assured myself for the benefit of Drs. Dysart and Craig that Mr. Clark was certainly blind in that eye.

Q. Which eye is that?

A. I think it was the left eye.

Q. How did you ascertain that fact, and how did you come to the conclusion?

(Testimony of Robert R. Brownfield.)

A. By certain tests known to specialists in diseases of the eye.

Q. Describe those tests briefly.

A. One of the most important is the Snell color test. That consists of a card with a black background with red or green letters or spots upon it. A colored glass lens is placed before the sound eye which is complementary to the color of the letters on the card. For instance, a green glass absorbs a red color and a red glass absorbs a green color. [239] So that if the green glass is put before the eye, the red of the corresponding complementary shade cannot be seen; if a red glass is placed before the eye, a complementary green cannot be seen. If a person has a good eye that is not covered with the red or green glass he sees all the spots, otherwise he simply sees the alternating spots which are red and green, first the red, a green, a red, a green, and so forth. If he is actually blind in the eye that is not covered by the complementary lense, he sees the alternating spots. If he isn't blind, he sees all of them.

Q. What other tests, Doctor, did you use?

A. The prismatic test, which consists of placing a prism before the good eye which is sufficiently strong to distort an image and displace it, causing diplopia or double vision. So that if Mr. Clark were able to see with the eye he claimed was blind, he would see double. If he was not able to see with that eye he would see single. Then there is a test with a prism that we employ in which the prism is

(Testimony of Robert R. Brownfield.)

not placed clear over the sound eye, and it is possible to make a person seeing with but one eye see double with the prism, he not knowing whether the prism was in proper position to see double or single, would be absolutely unable to know whether I expected him to see double or single at given times.

Q. Were there any other tests that you used?

A. Yes. I had him reading test type at twenty feet, and while he was reading, without him knowing what I was doing, I dropped a very strong convex lense before his sound eye which immediately shut off his reading. Nothing was placed before his other eye.

Q. Would it have been possible for him to have known that [240] his bad eye—that is to say, the left eye—was exposed and that the other eye was not exposed, so that it could read?

A. It wouldn't be possible for him to know what strength lens I placed before the eye. I might have placed a weak lens before the eye and he could go on reading. If I had placed a weak lens before the eye, which I had done previous to this, and he had been unable to read, then I would immediately have suspected that he was malingering. If he was afraid to go ahead when I placed the light lens before his eye, I would have suspected him. He did go ahead when I placed the light lens, but immediately I placed the strong lens he stopped.

Q. From your examination, what would you say with reference to whether or not he is able to see—has any vision whatever in the left eye to-day?

(Testimony of Robert R. Brownfield.)

A. He has absolutely no vision in that eye. I didn't finish in regard to my examination.

Q. Go ahead.

A. After I made the test that proved his blindness so far as subjective signs were concerned, I examined the eye with the ophthalmoscope, with which instrument it is possible to examine the interior of the eye. I found the media of the eye, especially the vitreous humor, was cloudy and more or less opaque. I could get a very slight, imperfect image of the retina, which would indicate that there was practically no sensation in the eye, although I believe there was enough of a reflex of the retina to make it possible for him to distinguish light from darkness, probably as much as a normal eye would see with the eye closed.

Q. That would not include the ability to distinguish objects?

[241] A. Not in the least—not even to distinguish the direction of the light. Simply a knowledge that there was light.

Q. Was that about all of your examination of him, Doctor?

A. Yes, with the exception of another test I made before I made the internal test. I had him reading and placed a pencil before the sound eye and it interrupted him. If his other eye had been sound it would not have interrupted him. A person with two sound eyes can be reading and a pencil or some other object can be intervened between either eye and not interfere, but if the person is reading with

(Testimony of Robert R. Brownfield.)

one eye and you place something between the good eye it immediately shuts him off. He stood up to that test all right. That, together with the questions I put to him to ascertain—to arrive at the history of the case—amounted to the examination. Then another test that is quite important in these cases is the pupilary reaction. The pupil of the blind eye does not react to light if directly focused into the eye. It will react to light focused into the sound eye —that is a reflex reaction—but if the light is thrown into the blind eye, the pupilary reaction is very slight if showing at all. And that is the case in Mr. Clark's eye.

Q. You attempted to secure a reaction?

A. Yes, sir.

Q. What was the result?

A. There was no appreciable reaction in the diseased eye. But the action of the pupil in the diseased eye when throwing light into the sound eye was quite normal, which is typical of cases of unilateral amaurosis.

Q. What would you say was the condition of the left eye at present—particularly from its being blind? What kind of [242] blindness is it, if any?

A. It is very hard to classify the kind of blindness, for the simple reason it is impossible to see the fundus of the eye. Can't tell whether there is atrophy of the optic nerve, which is probable—can't tell whether there is a rupture of the corneal coat. All we can tell is that he had a cloudy vitreous humor

(Testimony of Robert R. Brownfield.)

which is probably due to an internal hemorrhage. The condition of his eye indicates that at some time he has had a hemorrhage.

Q. Is there any possibility that the condition of his left eye will improve?

A. No, sir. All the cases that I have ever seen of this kind, and all the records that I can find of cases of this kind, go to show that Mr. Clark is permanently blind in that eye and that he never will recover any of the sight in that eye.

Q. Now, Doctor, the objective symptoms that you observed you have described? A. Yes, sir.

Q. What, if any, subjective symptoms did you observe?

A. Of course I presume the different symptoms which relied more or less upon his saying whether he could read certain type, would be classed as subjective, and aside from that I questioned him as to the immediate condition of the eye after the accident and his description of the condition of the eye and his description of the effect of the accident upon the eye soon afterwards and some time afterwards, leading up to the present time, is more or less typical of a direct injury to the eye or an injury to the head which would cause a hemorrhage into the eye.

Q. Now, Doctor, assuming that Mr. Clark was in a railroad [243] collision on March 15th, 1911; that he received at that time a severe blow upon the back of his head and also upon the back of his left shoulder and also upon his hip; that immediately after the accident there was some blood emitted from

(Testimony of Robert R. Brownfield.)

his left eye; that during—

Mr. KIBBEY.—We object to that; there is no evidence of any blood being emitted from his eye.

Mr. McFARLAND.—Only a scratch on his face, and no blood from his eye. Not a scintilla of evidence as to that.

Mr. SEABURY.—My recollection of the deposition of the witness is that he saw Mr. Clark wipe some blood from his face which came from his eye. That is my distinct recollection.

The COURT.—I didn't get that impression. Have you the deposition at hand?

Mr. SEABURY.—I think it was St. Thomas. (Examines deposition.)

The COURT.—There was testimony indicating the presence of blood on his face near the eye?

Mr. SEABURY.—Is there not also testimony that there was a bloody condition of the eye?

The COURT.—That after the accident the eye was bloody.

Mr. SEABURY.—And that there was pus in it, too.

Mr. KIBBEY.—That was afterwards. There is no evidence of any blood in his eye. The testimony was that there was a scratch on his face and that he wiped a little blood off.

Mr. KEARNEY.—The eye was discolored.

The COURT.—The eye was discolored soon afterwards—the iris particularly.

Mr. SEABURY.—And pus present in the iris.

(Testimony of Robert R. Brownfield.)

Mr. KIBBEY.—Not in the iris—no pus present in the iris.

The COURT.—I think the question should be amended.

[244] Mr. SEABURY.—We withdraw the question.

(To the witness.)

Q. Doctor, assuming that on March 15th, 1911, Mr. Clark was in a railroad collision and received a severe blow on his head and on his left shoulder and on his hip; that then or shortly thereafter his left eye appeared to be bloody—

Mr. KIBBEY.—We object to that.

Mr. SEABURY.—Now, if your Honor please, I prefer to put my question and let counsel make their objections afterwards without making it piecemeal.

Mr. KIBBEY.—Do we have to wait until he puts the entire hypothetical question?

The COURT.—Yes. I think the question should be put as a whole and then the opportunity should be afforded to present objections to it.

Mr. SEABURY.—If counsel will state now the objectionable portion of it—apparently every time I mention blood in the eye, that is the part that is objectionable.

The COURT.—If you will put your question now, there will be no interruption, and the Court will entertain any suggestions—any objections—and if the Court thinks the question should be amended I will indicate in what particular.

(Testimony of Robert R. Brownfield.)

(By Mr. SEABURY.)

Q. Assuming that on March 15th, 1911, Mr. Clark was in a railroad accident—a collision—in which he received a severe blow on the back of the head, also on the back of his left shoulder and on his hip; that then or shortly after the left eye appeared to be inflamed—that blood was found upon his face—that the eye contained some pus; that he experienced pain in the left eye for a period of approximately thirty days— [245] perhaps longer—; that he didn't discover the loss of vision in that eye for perhaps over thirty days after March 15th, 1911; can you say with reasonable certainty that the condition of blindness which you found to exist at the present time in the plaintiff's left eye was the natural and probable consequence of that accident or injury?

The COURT.—Is there any objection to that?

Mr. KIBBEY.—Yes. I don't know that there is any evidence at all that he didn't discover the loss of vision for thirty days—three days, I understand.

Mr. McFARLAND.—The third day he discovered total loss of vision. That is his own testimony—not thirty days, but three days.

Mr. SEABURY.—I will amend the question by substituting the words three days instead of thirty days, Doctor. Is there any further objection?

Mr. KIBBEY.—I think not.

The WITNESS.—I should say that it is possible and probable that such an injury would cause an immediate blindness or a blindness that might come

(Testimony of Robert R. Brownfield.)
on gradually afterwards, due to a hemorrhage into the eye.

(By Mr. SEABURY.)

Q. Can you say with reasonable certainty that the blow I have described as occurring as I have indicated in the previous question to the back of the head would probably cause the internal hemorrhage of the eye? A. Yes, it may easily do so.

Q. And I understood you to say that the appearance of the eye to-day indicates the existence at one time of an internal hemorrhage of the eye?

[246] A. It does. I have very little doubt but what he has had an internal hemorrhage of the eye.

Q. Now, wouldn't the existence of that internal hemorrhage—or would it not—produce naturally and probably the condition of blindness which to-day exists? A. It has produced it; yes, sir.

Q. Then you attribute the condition of blindness to-day to the condition of the internal hemorrhage; is that correct? A. Yes, sir.

Q. Now, I ask you whether there is any doubt in your mind as to whether or not the injury caused the internal hemorrhage to which you have referred?

Mr. KIBBEY.—We object to the question. He is asking for an opinion whether he has any doubt in his mind.

Mr. SEABURY.—I want to find out what the witness' opinion is.

Mr. BENNETT.—The question is leading and suggestive.

The COURT.—It is that, yes.

(Testimony of Robert R. Brownfield.)

Mr. SEABURY.—I will withdraw it and put it in another way.

(To the witness.)

Q. As I understand you, Doctor, you say that the present condition of blindness results from an internal hemorrhage? A. Yes, sir.

Mr. BENNETT.—We object to the question as leading and suggestive.

The COURT.—It is merely repetition of what the witness has already stated. If the testimony has not already gone in it would be suggestive.

Mr. BENNETT.—If it is already in the question is unnecessary.

Mr. SEABURY.—I think it is necessary to bring the witness to a point by questions already asked so that I can intelligently [247] frame the question.

The COURT.—This is a very intelligent witness and will doubtless have in mind anything that he has said on the subject.

Mr. SEABURY.—Your Honor sustains the objection?

The COURT.—Yes.

Mr. SEABURY.—I except to the ruling of the Court.

(To the witness.)

Q. Doctor, as I recollect it, when you answered the hypothetical question which I asked you, you said the result of blindness might possibly, and in your opinion probably did, result from this injury. Now, I ask you whether there is any doubt in your mind as to how this condition of blindness resulted and from

(Testimony of Robert R. Brownfield.)
what cause it came.

Mr. KIBBEY.—We object to the question. Let him give his opinion, but not state the fact.

Mr. BENNETT.—The witness has given his statement, and now he is asking him—

The COURT.—He has given his professional opinion on the subject, which is, I presume, all that anyone could give without actual knowledge of the facts.

Mr. KIBBEY.—And that opinion was based upon a hypothetical question and not upon the existence of facts—he assumed the existence of facts.

The COURT.—I think that question is objectionable—whether he has any doubt or not.

Mr. SEABURY.—We desire to preserve an exception to the ruling.

(To the witness.)

Q. Doctor, tell us whether or not it is your opinion that this condition of blindness resulted from the blow previously described, received by the plaintiff upon his head on March 15th, [248] 1911.

Mr. BENNETT.—We object to the question. The witness has already answered.

The COURT.—I think so. I don't see why the question is pressed in that way. He has already given his professional opinion.

Mr. SEABURY.—If your Honor please, the other questions which I asked were objectionable too, on the ground that I didn't ask him to state his opinion, and now when I do ask him to state his opinion they object that the opinion has already been stated.

(Testimony of Robert R. Brownfield.)

The COURT.—He was permitted to state his opinion.

Mr. SEABURY.—True, in answer to one hypothetical question, and the answer was somewhat qualified, and it seems to me I have the right to find out just the extent of the qualification that the witness made to that answer to that hypothetical question.

Mr. BENNETT.—That can be ascertained by reading the answer.

The COURT.—Of course the one answer isn't necessarily conclusive. If the answer has been understood and direct, full and complete answer—that is, if the question has been understood, and a full and complete answer has been given, then the rest would be in the nature of cross-examination of your own witness on that point. To put additional questions as to determining what may possibly be in the mind of the witness—what latent doubts may be in his mind—because it is the opinion of the expert here that is evidence, and merely his opinion.

Mr. SEABURY.—If your Honor please, I don't understand that I have yet secured from this witness an expression of opinion directly as to whether or not this condition of plaintiff's eye did result from this accident.

[249] The COURT.—I thought you had that. I thought the question was, what in his opinion was the cause of the blindness.

Mr. SEABURY.—Yes, your Honor, that is true.

The COURT.—And I understood him to say that

(Testimony of Robert R. Brownfield.)
it was possible or probably that the blow on the head was the cause.

Mr. SEABURY.—I ask the witness this—meanwhile I understand your Honor rules against me on the proposition?

The COURT.—Unless I am further informed showing that the question has not been fully and completely answered.

Mr. SEABURY.—Your Honor will allow me to respectfully except.

(To the witness.)

Q. Doctor, would you say that it is more or less than a matter of mere possibility that this condition of blindness resulted from the facts previously described in the hypothetical question?

Mr. KIBBEY.—He has answered that by saying possibly or probably.

Mr. SEABURY.—There is a vast difference between the two terms.

The COURT.—I think the witness may be asked to explain what he means by the terms he uses—possibly and probably. To that extent he may answer.

(By Mr. SEABURY.)

Q. Tell us, Doctor, what you mean by answering the hypothetical question by saying it might possibly or probably have resulted.

A. I mean this: there are other causes for hemorrhage into the eye, the greatest of which is nephritis, and in Mr. Clark's case the hemorrhage into the eye may have been due to the nephritis. It may have

(Testimony of Robert R. Brownfield.)

been due to the accident and it may have been due to the nephritis. It is impossible to tell from the condition of the eye at the present time which of the causes were [250] present and the real cause in his case. That is why I expressed it in a possible, doubtful manner.

Q. You also observed a condition of nephritis in Mr. Clark at the time of your examination.

A. I saw the examination of the urine; I didn't make it myself.

Q. From what you knew about the case either from Mr. Clark or from Dr. Dysart who was present at the examination, you are aware that he is now suffering from nephritis? A. Yes, sir.

Q. Do you know in what number of cases, if any, nephritis produces blindness?

A. No, I wouldn't care to state the percentage—it is rather large, but I wouldn't care to give figures on the number of cases of blindness resulting from nephritis, but it is very large.

Q. Do you know the number of cases which result from total blindness of one eye after a severe blow upon the head causing an internal hemorrhage of that eye?

A. No, I couldn't give a percentage on that.

Q. Would you say that the percentage is larger or smaller than the percentage of cases which result in blindness from nephritis?

A. I think the number of cases resulting in blindness from nephritis is very much greater than the number of cases resulting from a blow on the head,

(Testimony of Robert R. Brownfield.)

unless the blow on the head is sufficiently severe to cause either a fracture of the base of the skull or a direct injury to the eye-ball, and occasionally in cases of men past middle age a light blow on the head or to the spine causing reflex of the eye may cause total blindness in [251] one or either of the eyes or both.

Q. Now, Doctor, in your experience have you seen a great many cases of blindness resulting from nephritis?

A. Yes, I have—I see them every week.

Q. You have seen a great many in your practice?

A. Yes, sir.

Q. Have you ever seen a single case of total blindness in one eye which was the direct result of nephritis? A. Without blindness in the other eye?

Q. Yes.

A. I never have—without some effect on the sight of the other eye.

Q. Now, I ask you whether Mr. Clark's other eye is a well eye. A. It is perfectly sound.

Q. Does it indicate the slightest effect which would, in your judgment, be attributed to nephritis?

A. Not in the least.

Q. Now, is it or is it not your opinion that the condition of blindness which you find now existing in this left eye is the result of the nephritis or the result of the injury described?

Mr. BENNETT.—We object. The question has already been answered. He is now cross-examining his witness.

(Testimony of Robert R. Brownfield.)

The COURT.—It is almost a cross-examination, it is true.

Mr. SEABURY.—I think, in view of the facts developed, that it becomes important for the plaintiff to clear up with this witness the possible doubt that may exist in the witness' mind, or which may exist in the minds of the jury.

The COURT.—The question assumes something with regard to his examination, and also something with regard to the history of [252] the case that involves both the hypothetical feature and from his own examination. I have no doubt but what if there is a new element coming into the case you may put another hypothetical question involving that.

Mr. SEABURY.—I will do that, if your Honor will permit me to do it.

(To the Witness.)

Q. Now, assuming that on March 15th, 1911, Mr. Clark was in a railroad collision; that he received a blow on the back of his head and left shoulder and left hip, previously described; that thereafter an inflamed condition of his left eye existed—pus was found in it; that then about two days after this injury he had a case of pneumonia; that he also had one or more fractured ribs; that within three days after the accident there was a loss of vision in his left eye; that at that time and since, and at the present time, the right eye gave him no trouble and he was able to see from it; can you say—and further, that after the pneumonia a condition of nephritis existed; can you say with reasonable certainty

(Testimony of Robert R. Brownfield.)

whether the condition of blindness which you now find to exist in his left eye was the probable result either of the nephritis or of the blow received upon his head.

A. There is absolutely no doubt in my mind but what the blindness was caused either by nephritis or from a blow on the head—absolutely no question of that at all.

Q. It was one of those two that caused the loss of sight?

A. One of those two. The only possible doubt is which one. I can't say which one.

Q. Upon the facts which I have just given you in this last question, can you express an opinion as to which of those two [253] occurrences, namely, the condition of nephritis or the blow upon the head, more probably produced the blindness?

A. I think the most probable cause is the blow upon the head, for the reason that there is no affectation in the other eye. It is possible to have a unilateral blindness from nephritis, but I have never seen one, they are so rare.

Cross-examination.

(By Mr. KIBBEY.)

Q. It is possible, isn't it, that Mr. Clark's loss of vision of his left eye occurred before the accident?

Mr. SEABURY.—I object to the question. I don't think we are here to deal with possibilities.

The COURT.—I think so. I think anybody on the jury could answer the question as well as the doctor.

(Testimony of Robert R. Brownfield.)

Mr. KIBBEY.—He has just testified that he had no doubt that the loss of vision was attributed to either the blow on the head or the nephritis—most probably the blow on the head—that would exclude any other hypothesis.

The COURT.—Of course, it is possible.

Mr. KIBBEY.—Q. Your opinion that the loss of vision in this eye was due either to nephritis or to the blow upon the head—and you think more probably from the blow on the head—is based upon facts of which you have no personal knowledge?

A. I think the fact that the plaintiff was healthy beforehand—blindness always has a cause.

Q. I understand, but you are assuming as a fact that he was in good health before, and that he had all these conditions that lead you to this opinion, except what you ascertained from the patient himself, is based upon the assumption to their truth?

[254] A. Yes, sir.

Q. Now, how closely did you examine this eye?

A. I examined it very minutely.

Q. Did you see the optic nerve?

A. No. You can't see the optic nerve through the cloudy media in front of the optic nerve. It is impossible to see the optic nerve in this eye.

Q. Now, what are the evidences of the hemorrhage there?

A. The debris and cloudiness, and I may say mottled condition and appearance of the vitreous humor, which indicates the absorption of free blood. The debris left after the absorption of free blood in the

posterior chamber.

Q. Was there anything in the eye to enable you to determine where the hemorrhage occurred?

A. No, sir, I couldn't get a sufficiently clear and complete vision of the fundus to tell that. Sometimes we can, but when the media is not so cloudy.

Q. This state of blindness is due or could exist, do you think, without the optic nerve itself being affected?

A. Oh, yes, by all means, yes. Just the same as the cloudy condition of the cornea or front part of the eye could produce blindness.

Q. It is a mechanical obstruction?

A. Yes, sir. It may not be, but it could be, the same as if I held my hand over the eye, or if there was a cloudy condition of the cornea.

Q. And the optic nerve itself may be unaffected?

A. It may be.

Q. Would the hemorrhage—describe to the jury what you mean by a hemorrhage, and where that hemorrhage occurred.

[255] A. Any amount of blood, whether it is a small amount or a large amount, is a hemorrhage—especially applied to the eye. The slightest spot of blood from the smallest possible capillary either in the conjunctive, which is the outer eyeball, or in the sclerotic coat and in the ball of the eye proper, the slightest particle of blood is a hemorrhage. And the slightest portion of blood in the inner part of the eye is bound to cause trouble, because it increases the pressure of the eyeball, and in that way by pres-

(Testimony of Robert R. Brownfield.)

sure on the retina produces either an inhibition of sight or total blindness. Now, afterwards that hemorrhage, if it is slight, may be reabsorbed, but the injury is done. With a hemorrhage of any extent into the eyeball the injury is permanent—I think in ninety-nine cases out of a hundred the injury is permanent after a hemorrhage into the posterior chamber.

The eye is divided into two chambers, the anterior and the posterior, and the lens or iris is the partition. The posterior is much the larger part and contains the retina or the real seeing part of the eye, and is the vital part of the eye when it comes to sight.

Q. Now, could you determine how extensive this hemorrhage had been?

A. I can't say how extensive, but I judge that it was quite a little hemorrhage, sufficient to increase the tension of the eyeball and to pollute the interior vitreous humor, which is the semi-liquid fluid which fills the posterior chamber.

Q. Could there be a slight hemorrhage and not cause that blindness?

A. Yes, there could be a slight hemorrhage and not cause [256] total blindness. If it didn't occur in front of what we call the disk—the optic disk. If it occurred in front of the optic disk, the pressure upon the optic disk which would be increased would be sufficient to produce more or less of atrophy of the retina, and if it occurred to the side of the optic disk it might cause a blind spot in the ret-

(Testimony of Robert R. Brownfield.)

ina but not a total blindness, and then he would have what we call a restricted vision—might see to one side of the median line—one side see perfectly, and the other side not at all.

Q. Part of the field of vision obscured?

A. Yes.

Q. What is the tendency of that sort of a hemorrhage? A. As to recovery?

Q. Yes.

A. When due to hemorrhage it usually does not recover—when due to hemorrhage in the eye. When due to hemorrhage in the sheath of the optic nerve they usually recover. More frequently, however, the condition occurs from hemorrhage in the optic sheath and they recover to some extent, but when in the eyeball proper they do not recover.

Q. What is generally your prognosis in hemorrhage of the eye? A. Very bad.

Q. By that you mean to extend to total blindness?

A. As a rule, yes. It usually renders the eye useless, even if small. I usually tell the patient that if he has the other eye left he is fortunate.

Q. Does that occur soon?

A. Yes, usually at the time of the hemorrhage. It may increase afterwards, for the hemorrhage may last for several days.

[257] Q. Could you by an observation discover the location of the hemorrhage at any stage of the disease?

A. If the hemorrhage was not large before the cloudy condition was produced in the vitreous humor

(Testimony of Robert R. Brownfield.)

proper, the site of the hemorrhage can be located—sometimes an actual rupture of the retina can be found—a large rent and flap hanging down.

Q. Did you find any evidence of rupture?

A. I could not see the fundus at all.

Q. Then you found none?

A. No, sir, I couldn't find any because I couldn't see the fundus.

Q. Suppose a man had been in a normally healthy condition at the age of sixty-five years and had met with a railroad accident by which some of his ribs were fractured and by which he developed an injury to the hip, and after two or three days being confined to his bed, that he read a good part of the time—newspapers and magazines—and made no complaint whatever or allusion to his eye—either of pain in it or the loss of vision. What would be your opinion as to the probability of the injury having occurred from that accident?

Mr. SEABURY.—We object to the question as assuming a state of facts not proved. There is no testimony in the case that I can recall that he read a good part of the time. The testimony of the nurse is that he read at intervals of twenty or thirty minutes.

The COURT.—I think that is the testimony.

(By Mr. KIBBEY.)

Q. Very well. That he read at intervals of twenty or thirty minutes for a period of eight days, and during that time made no [258] complaint of injury or pain, what would be your opinion as to the

(Testimony of Robert R. Brownfield.)

injury causing the blindness within that period?

Mr. SEABURY.—We object to the question: it improperly assumes a state of facts not proven.

The COURT.—In what particular?

Mr. SEABURY.—Particularly with reference to his lack of complaint during that entire period. There is also proof that he did complain of pain in his eye—he testified he suffered pain.

Mr. KIBBEY.—I am talking about complaint.

Mr. SEABURY.—That is not material. The question is, did he have pain or not, not whether he complained of it.

The COURT.—I think I expressly excluded that—whether he had pain or did not. I think that should be excluded. In putting the question in this way they may elicit the fact to be either one way or the other.

Mr. SEABURY.—I except.

The WITNESS.—In stating my opinion, I might explain, if I may, that a hemorrhage into the posterior chamber is not necessarily painful, and that a person with one eye may see and read and not know that he is blind in the other eye until something intervenes between the good eye and the object at which he is looking. He may be unconscious of blindness in one eye for many months if he does not happen to close the good eye for some purpose or other.

(By Mr. KIBBEY.)

Q. Do you mean to say, Doctor, that a man may suddenly lose the vision of one eye and then go sev-

(Testimony of Robert R. Brownfield.)

eral months without discovering the blindness?

A. He may; yes, sir. The same as he may lose the hearing [259] of one ear and go for years without discovering it.

Q. Although it is sudden?

A. That is all the more reason for his not discovering it, because it is sudden, and a month is not a very long time; but if it had been coming on for several months—

Q. But suppose he immediately discovers it—or say he immediately discovered it within three days after an accident and made no complaint of it, but continued to read at intervals extending over a period of twenty minutes, would you attribute that loss of vision to that accident or could it not have been attributable to antecedent causes?

Mr. SEABURY.—We object to the question as incompetent and that it improperly assumes a state of facts not proved, and is not a proper hypothetical question.

The COURT.—He may answer.

Mr. SEABURY.—We except.

The WITNESS.—Will you put the question again?

(Thereupon the reporter reads the question last propounded.)

A. I don't think that that condition of facts would interfere with my former opinion that it was due to the accident, because a man might be nervous and lying in bed from an injury and read even though he might think he was injuring his eyes, and even

(Testimony of Robert R. Brownfield.)

though he might know that it was not doing him any good to read. Men are not always thoughtful of their eyes when nervous and lying in bed.

Q. You are taking into consideration, then, some rather extraordinary circumstances in giving your opinion that a man may have read and known he was injuring his eye, and nevertheless made no complaint?

A. That is very often the case. Men will sometimes abuse [260] their eyes directly against the advice of their physician—when the physician may even go so strong as to tell them they are going blind unless they stop.

Q. And while the physician is in attendance upon a patient he suddenly discovers a loss of vision and continues to read and makes no complaint either of the loss of vision or of pain—what would you say?

Mr. SEABURY.—We object to the question on the grounds already urged.

The COURT.—I don't know that I caught the question. Please read it, Mr. Reporter.

(Thereupon the reporter reads the last question propounded.)

The COURT.—Does it appear that no mention was made to the physician?

Mr. KIBBEY.—The nurse says that he didn't complain, and that was while the physician was in attendance.

The COURT.—You have reference to the loss of vision and not to the injury?

Mr. KIBBEY.—Yes.

(Testimony of Robert R. Brownfield.)

The COURT.—He may answer.

Mr. SEABURY.—Note an exception, please, Mr. Reporter.

The WITNESS.—He may— Let me have the question again, please.

(Thereupon the reporter reads the same question again.)

The COURT.—I don't think there is any evidence that he didn't complain of the pain.

Mr. KIBBEY.—The nurse says he didn't complain about the eye.

The COURT.—She says she treated the eye.

Mr. SEABURY.—Yes, that she wiped out some pus.

The COURT.—What does the nurse say on that subject?

[261] Mr. SEABURY.—The nurse does testify that he didn't complain of pain in the eye to her, but she also says that he complained of his wounds in a general way, as I understand the testimony.

The COURT.—I overrule the objection. You may answer.

Mr. SEABURY.—We except.

(Thereupon the reporter again reads the last question.)

Mr. SEABURY.—I respectfully further suggest that the question is not complete— What would you say about that?

The COURT.—I presume he takes the question in the light of what preceded it.

The WITNESS.—I don't think it would alter my

(Testimony of Robert R. Brownfield.)
opinion as to the injury. It might alter my opinion as to the peculiarities and characteristics of the patient. He might be a peculiarly stoical sort of a fellow.

(By Mr. KIBBEY.)

Q. Suppose he complained of pain in his ribs and of pain in his hip, and suppose he complained of pain in his back—would that be evidence of a stoical character?

A. In all probability the pain in his head and ribs and back was greater than the pain in his eye. I have seen a number of cases where they didn't complain of the eye at all. Pain isn't one of the characteristic symptoms of hemorrhage into the eye.

Q. Is it common?

A. It sometimes occurs, but it is not characteristic.

Q. But the lack of complaint of loss of vision or impairment of vision, would that modify your opinion in any way?

A. Well, I don't know. That is a very different question. I do not believe it would modify my opinion in any way. As I say, it might show some of the characteristics of the patient. [262] Some people don't value the vision of an eye—or don't think of the vision of one eye being gone temporarily as anything of great importance. Lots of times they think it will come back.

Q. You mean you think it is not a matter of very great importance, or the plaintiff didn't think?

(Testimonv of Robert R. Brownfield.)

A. I think probably he thought it was temporary at the time.

Q. Now, suppose that within two months after that accident it had been found there was an atrophy of the optic nerve, would that affect the vision?

A. Oh, yes.

Mr. SEABURY.—We object to the question; there is no proof that any such condition existed.

Mr. KIBBEY.—That is true, but I am cross-examining.

The COURT.—You may make him your own witness as to other facts.

Mr. KIBBEY.—And I cannot cross-examine.

Mr. McFARLAND.—You may base your hypothetical question on facts proven or on those that will be proven.

The COURT.—How is the Court to know what is to be proven?

Mr. McFARLAND.—That is for the Court to instruct the jury as to the effect of such testimony. For instance, if the hypothetical question is not based upon facts, the Court may instruct the jury that that evidence is absolutely worthless because it must be based upon facts assumed proven or to be proven, otherwise the opinion of the expert isn't of any value whatever.

Mr. KIBBEY.—We haven't gotten to our case yet to establish any facts.

The COURT.—I understand, but unless there is some evidence [263] tending to establish the fact assumed in the hypothetical question, it is improper

(Testimony of Robert R. Brownfield.)
to put it; and I don't understand the rule to be that you may assume—unless there is something in the record to indicate that that will be an issue—assume a fact not testified to by any witness.

Mr. KIBBEY.—Very well.

Mr. McFARLAND.—We think that is based upon facts in the case. If these facts do not exist either at present or subsequently—

The COURT.—The Court can't rule intelligently on any hypothetical question on the assumption that the testimony may hereafter be adduced to sustain such fact.

(By Mr. KIBBEY.)

Q. What is atrophy of the optic nerve?

A. It is a gradual destruction of the nerve elements—the vital elements of the nerve.

Q. What effect has it on the vision?

A. Absolute blindness, if it is complete.

Q. Can you tell simply by looking at the patient, or at one who may be afflicted by an atrophied optic nerve?

A. The only way I can tell is to examine it with the ophthalmoscope—examine the fundus of the eye—and only a man experienced in the use of the apthalmoscope can tell it then.

Q. And sometimes not then? A. Oh, yes—

Q. But you didn't discover whether there was an atrophy or not?

A. Not in this case, no, because I couldn't see the fundus.

Q. What is the general result as to producing

(Testimony of Robert R. Brownfield.)

blindness, of an atrophied optic nerve—sudden or gradual?

A. Gradual, unless the injury severs the optic nerve, and [264] then the blindness comes before the atrophy.

Q. But suppose it is not severed?

A. Then it is gradual.

Q. If within two or three days after this injury there had been a hemorrhage in the eye, would you attribute it to nephritis resulting from that accident? Within that time could that develop?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial, not a proper hypothetical question, not based upon facts proved in this case—no proof as to what time this hemorrhage took place at all. The question assumes that the hemorrhage took place two or three days after the accident, while the strong probability is that it occurred at once.

(By Mr. KIBBEY.)

Q. Then occurring at once—suppose it occurred at once at the instant of the injury, would you attribute it to nephritis? A. No.

Mr. SEABURY.—We object—incompetent and improperly formed.

The COURT.—I think that is proper cross-examination.

Mr. SEABURY.—We except.

The COURT.—Restate the question.

(By Mr. KIBBEY.)

Q. If the hemorrhage in the eye occurred immedi-

(Testimony of Robert R. Brownfield.)

ately at the time of accident, would you attribute it to nephritis?

A. Not unless he had nephritis before the accident.

Q. Then if nephritis can be looked to as a cause for that hemorrhage, it would have to be from a pre-existing nephritis? A. If nephritis—

[265] Q. If the hemorrhage was attributable to the nephritis, it would have to be attributable to a nephritis that was pre-existing?

A. Yes, I think that is true, but it might be due to increased blood pressure that existed at the time of the pneumonia or at the time of the accident, aside from the blow.

Q. Now, Doctor, suppose there was no blow upon the head at all, to what would you attribute the blindness?

A. In that case, if there was no blow on the head at all, and the blindness occurred from the accident—

Q. Now, you are assuming that it did occur—

A. Allow me to assume that it did occur, if I may. If the blindness or hemorrhage occurred from the accident, it would have to be due to increased blood pressure. Any time a man of Mr. Clark's age has an accident or is excited or frightened or angry, or anything of that kind, his blood pressure naturally suddenly increases, and that is the cause of apoplexy. Now, Mr. Clark had an apoplexy of the eye. It may have been caused from a direct blow, from a blow to some other part of the body, or nephritis, or

(Testimony of Robert R. Brownfield.)

any condition that might raise the blood pressure. I believe that is a pretty complete answer to the question?

Q. Yes. But that is still not incompatible with the fact that he may have a loss of vision long before.

A. It may have been, of course.

Q. And knowing nothing but the statement made by him of his history, you are disposed to attribute it to that accident?

A. Yes, sir. His history is very typical of hemorrhage.

Q. But hemorrhage could have occurred even prior to that accident?

[266] A. It could have; yes.

Q. And had hemorrhage of the eye occurred long prior to that accident, you would have found the eye in about the same condition as it is now?

A. Yes, sir. There is no way by which I can fix the time.

Q. You connect, then, the loss of vision as being attributable to that accident to some statement of his as to his condition before that?

A. Naturally, yes, sir.

Q. A man with vision gone as in this case could go about among his neighbors and associates without disclosing the loss of vision in that eye, may he not?

A. Yes, he may. He may be averse to telling of his infirmities.

Q. They are naturally averse to telling?

A. Yes, sometimes.

Q. From sensitiveness and from business reasons?

(Testimony of Robert R. Brownfield.)

A. Yes, he may have wished to return to his position.

Q. There would not be anything in his manner if he was disposed to conceal the fact, to indicate to the casual observer or even an acquaintance or associate the fact that he had lost the vision of one eye?

A. No, I don't think there is.

Mr. KIBBEY.—That is all.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of R. W. Craig, for Plaintiff.]

R. W. CRAIG, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Doctor?

[267] A. R. W. Craig.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been such?

A. Since 1895.

Q. Where do you now practice?

A. In Phoenix, Arizona.

Q. How long have you been engaged in practice here? A. Fifteen years.

Q. Tell us, please, Doctor, what your preliminary education has been as physician and surgeon.

A. I graduated at the Rush Medical College in 1895 and spent eighteen months as house surgeon at the Cook County Hospital as an interne.

(Testimony of R. W. Craig.)

Q. Since that time have you been actively and continuously engaged in the practice of your profession? A. I have.

Q. Have you been brought frequently in contact with cases of personal injuries?

A. I have seen a good many; yes, sir.

Q. Do you know the plaintiff, Mr. Clark, in this case? Thomas P. Clark.

A. I saw Mr. Clark the other day at my office.

Q. During the month of November, 1912?

A. Yes, sir.

Q. Were Dr. Dysart and Dr. Brownfield present at least part of the time you were there?

A. Yes, sir.

Q. Did you make an extended examination of him?

A. Yes, sir.

[268] Q. Please describe to the Court and jury what you found with reference to the physical condition at that time of the plaintiff.

A. I found that he had had an injury to the ribs of his right side, if I remember rightly, the third and fourth ribs had been fractured, and the evidences of the fracture are still there. He complained that he had some subjective symptoms of injury to the short ribs on the left side. I could never find any objective symptoms of injury there, but he complained constantly of tenderness when I was trying to attract his attention to something else so that he would forget it—so I assume he had an injury there on his short ribs.

Q. What, if anything, did you find with reference

(Testimony of R. W. Craig.)

to the condition of his kidneys?

A. All I know about that is the examination which Dr. Dysart made of his urine, which showed that he had a chronic interstitial nephritis.

Q. And that is ordinarily described as Bright's disease? A. Yes, sir.

Q. And that is of an incurable type in this instance, isn't it? A. Yes.

Mr. McFARLAND.—What is the answer?

The WITNESS.—In any instance. I will change that.

(By Mr. SEABURY.)

Q. Did you participate in the examination in reference to his eye?

A. Only in being present and hearing the conversation.

Q. You don't know, then, what the condition of his eye was, do you?

[269] A. No, I didn't examine his eye with the ophthalmoscope.

Q. Now, Doctor, tell us whether a fracture of the rib is a common or inducing cause of pneumonia, or not. A. It is—very common.

Q. Will you tell us whether nephritis is a common or inducing result of pneumonia?

A. In this way it is: people with acute infectious diseases of any variety of acute disease of any sort are prone to a consequent nephritis—so much so that in any acute case like typhoid and pneumonia we constantly watch the condition of the urine to see if they are developing nephritis, and in that way

(Testimony of R. W. Craig.)

I would say pneumonia is a cause of nephritis.

Q. Pneumonia is one of the so-called specific fevers? A. Yes.

Q. Isn't it a fact that all of the specific fevers may and frequently do result in a condition of nephritis?

A. Yes.

Q. Is there any way for you to tell how long this condition of nephritis had existed? A. No.

Q. Wouldn't the length of time in which that condition of nephritis had existed be indicated in at least the color of facial expression of the defendant?

Mr. KIBBEY.—We object to the question—he is cross-examining his own witness.

The COURT.—It is open to that objection.

(By Mr. SEABURY.)

Q. I will ask you to state what, if any, indications—external indications—there would be in a person's appearance indicating a condition of nephritis.

[270] A. With an acute nephritis, during the course of the first few weeks there would be no particular indications of it. As the nephritis extends over a term of years or months, a patient will usually become more or less anemic and pale and inclined to puffiness around the eyes. That is practically the only external appearance of nephritis you get.

Q. Do those conditions become more marked as the disease progresses?

Mr. BENNETT.—We object to the question as leading and suggestive. It is not necessary. Doc-

(Testimony of R. W. Craig.)
tor Craig is able to understand questions without being led.

Mr. SEABURY.—Every question is more or less leading, otherwise they would not be made. I am not desirous of asking leading questions.

The COURT.—I am of the opinion that the question is leading.

Mr. SEABURY.—I will change it.

(To the Witness.)

Q. What, if any, increased indications such as you have described, Doctor, come from this disease as it progresses?

A. Only an aggravation of the condition I have just described. As time goes on those symptoms become more pronounced—this appearance of anemia and puffiness.

Q. So that wouldn't the appearance of the patient at the time of your examination enable you to estimate the probable duration of his illness up to that time?

A. Only in a very vague way. I might have an opinion but couldn't base the opinion on any very good logic.

Q. Could you express an opinion as to whether or not this nephritis you found to exist in this case is of a long or short duration? [271] A. No.

Q. That could not be ascertained to-day?

A. I don't think so.

Q. Now, Doctor, assuming that Mr. Clark, when he was sixty-five years of age in March, 1911, was in a railroad collision, in which collision he received

(Testimony of R. W. Craig.)

a blow upon his head and his left shoulder and left hip; that he sustained a fracture of his ribs; that thereafter he had a case of pneumonia of which he was cured; could you say with reasonable certainty whether or not the condition of nephritis which you find now to exist was the natural and probable result of that pneumonia?

A. I should say it was extremely probable that it was the result of the pneumonia.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say you found an injury to the ribs on the right side?

A. That is my recollection of the examination.

Q. What condition did you find those ribs in?

A. There was a slight deformity with callouses that were thrown out at the time of the fracture.

Q. Where they healed? A. Yes.

Q. And practically well? A. Yes.

Q. You saw no difficulty other than the evidences of the fracture? A. That is correct.

Q. This nephritis is what is ordinarily known as Bright's disease? [272] A. Yes, sir.

Q. It acquired its name from the name of the man that is supposed to have discovered it?

A. I presume so; it is so old I don't remember.

Q. A couple of hundred years old?

A. Something like that, I should think.

Q. They are synonymous terms? Nephritis and Bright's disease?

A. Yes, sir—they are synonymous.

(Testimony of R. W. Craig.)

Q. Now, does Bright's disease ordinarily follow or result from pneumonia?

A. Sometimes it does.

Q. I say ordinarily.

A. I don't know as I understand your question. Do you mean that it is ordinarily true that every case of pneumonia is followed by Bright's disease, or that every case of Bright's disease—

Q. I mean, would you say that the fact that one had pneumonia that the reasonable probability would be that it would be followed by Bright's disease?

A. No.

Q. That is the exception rather than the rule?

A. Yes.

Q. So you wouldn't say that ordinarily Bright's disease would exist as a result of pneumonia ordinarily? A. No.

Q. But, on the contrary, would you say it might?

A. Taking a series of Bright's disease I wouldn't say that ordinarily it would result from pneumonia.

Q. If it did result it would be an exception to the rule? [273] And not the rule.

A. And not the rule.

Q. Wouldn't it depend to some extent upon the severity of the case of pneumonia?

A. I think not—not much. It wouldn't make much difference.

Q. Suppose a case of pneumonia developed—a mild case—typical pneumonia—and the patient was relieved of that trouble in a few days, would you say it would be a probability that nephritis would result?

(Testimony of R. W. Craig.)

A. A person is just as likely to have nephritis following a slight attack of infectious fever of any kind as a severe one.

Q. Then the degree wouldn't cut any figure?

A. Not in a general sense.

Q. Now, couldn't that disease occur from any other causes besides pneumonia?

A. Many others.

Q. Might occur from a severe case of bronchitis, mightn't it? A. Yes.

Q. Occur from a cold?

A. Yes—cold and bronchitis are practically synonymous.

Q. Isn't Bright's disease albumen in the urine?

A. You find albumen in the urine in Bright's disease.

Q. That is what practically constitutes Bright's disease?

Q. That is the common symptom—that is the symptom people generally recognize, although it involves many things besides albumen, and there are other things that produce albumen in the urine besides Bright's disease.

Q. But that is always present in Bright's disease?

A. Not always; no.

[274] Q. Is sugar present?

A. Sugar is never present in Bright's disease unless the patient has an associated diabetis.

Q. If this patient had a severe case of bronchitis previous to this accident, would you say that the pneumonia which set in was just as probable a re-

(Testimony of R. W. Craig.)

sult from that severe case of bronchitis as from any other cause—and probably more liable to have resulted from that?

A. That is a little bit vague. It would depend on when this bronchitis occurred. A pneumonia following an injury—particularly an injury to the chest—is most probably the result of the injury to the chest.

Q. Rather than the bronchitis?

A. Yes, I should think so.

Q. Suppose he had an acute trouble, or bronchitis, for a week or ten days before, and then the accident occurred and pneumonia set in, would you say it was from the injury to his body or from the bronchitis?

A. I would say it would be an utter impossibility to tell. Probably due to both.

Q. It might be due, though, from the bronchitis, might it not? A. Yes, I should think so.

Q. It might be due to the wounds he received?

A. Yes.

Q. In what condition did you find the other ribs that you examined?

A. I found no objective symptoms of any injury at all on the left side.

Q. So far as your observation and examination went, the injuries to the ribs were practically cured and well? [275] A. Yes.

Q. No trouble in that respect? So he was not suffering from any inconvenience or trouble as a result of these injuries?

A. I wouldn't like to say that, because as I ex-

(Testimony of R. W. Craig.)

plained a little while ago, he constantly complained of tenderness in the region of the short ribs on the left side, even while I was trying to attract his attention to something else. So I wouldn't like to say he wasn't suffering, although I found no evidence of injury there at the time I made my examination.

Q. You found no evidence? A. No.

Q. The only basis of that conclusion is his complaint? A. His complaint.

Q. And that alone? A. And that alone.

Q. Your examination would lead you to the contrary?

A. My examination was entirely negative so far as any injury to the short ribs on the left side.

Q. Then you would say as an expert that there was no difficulty present in those short ribs?

A. I didn't find any.

Mr. McFARLAND.—That is all.

(Witness excused.)

[Testimony of Mrs. Thomas P. Clark, for Plaintiff.]

Mrs. THOMAS P. CLARK (wife of plaintiff), being called as a witness in behalf of the plaintiff and duly sworn, is withdrawn from the witness-stand without testifying.

Mr. SEABURY.—If your Honor please, we will withdrawn Mrs. Clark and substitute another witness first.

The COURT.—Very well, you may do so.

[Testimony of A. T. Thompson, for Plaintiff.]

[276] A. T. THOMPSON, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KEARNEY.)

Q. What is your name? A. A. T. Thompson.

Q. On March 15th, 1911, where did you live, Mr. Thompson? A. At Clifton, Arizona.

Q. What position, if any, did you then hold with the defendant in this case?

A. At that time I was the traffic manager, treasurer and secretary of the Arizona and New Mexico Railway.

Mr. KEARNEY.—If the Court please, I called this witness for cross-examination under provisions of section 2504 of the Revised Statutes of Arizona, 1901—for cross-examination.

Mr. KIBBEY.—That only applies to a party to the action.

(By Mr. KEARNEY.)

Q. Mr. Thompson, you heard the testimony about A. & S. cars being in the yards at Clifton on March 15th, 1911? A. Yes, sir.

Q. Are those the Colorado & Southern cars?

A. Yes, sir.

Q. Were those cars brought in from Gray Creek, Colorado?

A. I don't know where they were brought in from.

Q. They were foreign cars and not cars of the defendant? A. Yes, sir, they were foreign cars.

(Testimony of A. T. Thompson.)

Q. Brought in from a point outside of the territory of Arizona? A. Yes, sir, so far as I know.

Q. Those cars were consigned to the Shannon Copper Company, [277] were they not?

A. Yes, sir.

Q. Those cars were all wide gauge cars?

A. Standard gauge cars.

Q. At that time did the Shannon Copper Company own any wide gauge cars using that Shannon track?

A. Not that I know of. I don't think they have any standard gauge cars.

Q. Then the defendant company delivered those cars to the Shannon Copper Company's smelter up on the hill over the Shannon switch, did they not?

A. Yes.

Q. And at this time that Mr. Clark was moving those cars there then the defendant was in the act of delivering those cars and taking them up and delivering them to the Shannon Copper Company's smelter on the hill?

A. That is as I understand it.

Q. How much did the defendant pay for moving the cars—

Mr. McFARLAND.—We object to the question, for the reason that there is not allegation in the complaint upon which to base such testimony. The complaint says that the cars were consigned to the Shannon Copper Company at Clifton, and there is no allegation of any contract or agreement between the defendant and the Shannon Copper Company to do

(Testimony of A. T. Thompson.)

anything more with those cars than the fact of their consignment and delivery in the yards. I think, as the Court very correctly said the other day, before any agreement about anything that should be done by the defendant with those cars after they were delivered in the yards, now there must be some allegation to base the evidence on, and the fact that there is none, and no pretense of any, would not [278] authorize the introduction of evidence upon the matter—

The COURT.—The allegation in the complaint is that they were engaged in interstate commerce?

Mr. McFARLAND.—Yes, sir.

The COURT.—And as a common carrier.

Mr. McFARLAND.—Yes, sir.

The COURT.—The allegation is that—is the allegation that at the time of the accident these cars were en route between some point outside of the territory to Clifton?

Mr. McFARLAND.—To Clifton.

The COURT.—To Clifton?

Mr. McFARLAND.—I think so.

The COURT.—You may be right if that is true. There might be a variance, in other words.

Mr. McFARLAND.—If the object of this was to show that the defendant and plaintiff were engaged in interstate commerce in switching those cars in its yards at Clifton— Is that the object of it?

Mr. SEABURY.—I think the object of the testimony is quite apparent. We offer it for the purpose of showing that the company was not only a common

(Testimony of A. T. Thompson.)

carrier but also—

The COURT.—Let me have the complaint.

Mr. SEABURY. (Handing complaint to the Court.) —engaged in interstate commerce. I direct your Honor's attention to page four of the complaint, which shows that the consignment was to the Shannon Copper Company at Clifton. That is only descriptive of the location of the Shannon Copper Company at that place.

The COURT.—I think this allegation meets your objection, Mr. McFarland. (Thereupon the Court reads from page three of the [279] second amended complaint.)

Mr. McFARLAND.—Now, if the object of that question is to show that in the operation complained of, that the defendant was engaged in interstate commerce, so as to bring it within the allegations of the complaint, it might be material.

The COURT.—The Court could not rule it out if it is material in any aspect of the case.

Mr. McFARLAND.—In what other aspect could it be material?

The COURT.—As indicating that the company was engaged as a common carrier.

Mr. McFARLAND.—We admit that, but not in connection with this particular transaction.

The COURT.—And in this particular transaction.

Mr. KIBBEY.—No. They didn't haul anything up there except to deliver it to the Shannon Copper Company.

The COURT.—Isn't it a common carrier in doing

(Testimony of A. T. Thompson.)
that kind of business?

Mr. KIBBEY.—No.

The COURT.—If it is a common carrier then it comes within the provisions of the act of Congress of 1910.

Mr. KIBBEY.—Suppose it is a special carrier. It didn't bill things out of there and didn't engage in business of a common carrier.

The COURT.—Suppose it volunteers to do that, isn't it subject to all the liabilities of a common carrier? I shall not finally conclude that point at present, but my own impression now is that I shall overrule you on that point.

Mr. BENNETT.—Before the Court rules I should like to have the question read. I think it is objectionable.

(Thereupon the reporter reads the following question: [280] Q. How much did the defendant pay for moving the cars?)

Mr. BENNETT.—We think it is objectionable as being immaterial.

Mr. SEABURY.—We will substitute this question with the Court's permission, and yours, Mr. Kearney.

(To the Witness.)

Q. Did the defendant receive any pay or compensation from the Shannon Copper Company for moving cars up the Shannon switch on the 15th of March, 1911?

Mr. BENNETT.—We object to that question for the same reason. That it is irrelevant and immaterial.

(Testimony of A. T. Thompson.)

The COURT.—Doesn't it bear upon the question as to whether they were acting as common carrier?

Mr. BENNETT.—No; they may or may not have received any pay from the Shannon Copper Company. They may have been doing it for an accommodation.

The COURT.—You think the matter of pay does not determine the character of the carrier?

Mr. BENNETT.—Not at all, your Honor.

The COURT.—That is probably true. I can conceive that a railroad might be a common carrier even if they didn't charge anything for the specific service in which they might be engaged.

Mr. BENNETT.—That is true.

The COURT.—But it bears upon the point. It tends to indicate whether that is not part of their regular business.

Mr. BENNETT.—I think Mr. Clark testified that the Shannon Copper Company's engines and trains came down that switch and used that switch too. The testimony is that that was their line and that they used it as their railroad. Now, we can't conceive it would make any difference whether the Shannon Copper [281] Company paid anything in addition to the freight charge to Clifton for this service or not.

The COURT.—Suppose the question was as to the liability of the one company against the other. Suppose that they were independent lines. Isn't there proof here indicating that this accident—at least that

(Testimony of A. T. Thompson.)
this train of cars—was upon the main line of the road?

Mr. BENNETT.—Which train of cars?

The COURT.—It was at the switch. These cars that collided with this train, as I understand, were still upon the main track.

Mr. BENNETT.—The testimony distinctly is that the accident occurred after the train or engine—the cab of the engine—had passed the frog, which would be on the way up the switch.

The COURT.—Clark was a little uncertain just where it was. But, as I understand, the four cars that moved and which that shifting of the four cars substituted the proximate cause of the accident, were upon the main track.

Mr. BENNETT.—The cars which rolled were upon the main track, but the engine—

The COURT.—It wouldn't make any difference if the injury occurred on the other side of the mountain—but if the negligence—the proximate cause of the injury—occurred on the main track, it seems to me this question is academic.

Mr. BENNETT.—Then the question is not competent—it is immaterial.

The COURT.—It might be immaterial if there is no doubt as to that—might be some doubt as to that—might be evidence to indicate that that is not the case. Aside from that, as I say, I think the evidence is not objectionable upon the ground of its [282] immateriality. I think the matter of pay may not cut much figure in that matter characteriz-

(Testimony of A. T. Thompson.)

ing the service that was being rendered there, whether it was a common carrier or not.

Mr. SEABURY.—It seems to us, in view of the apparent difficulty and misunderstanding as to what concession the defendant made the reference to this defendant being a common carrier on that day, we ought to be permitted to prove that on the 15th of March, 1911, the defendant was a common carrier. It is now suggested that some relation of special carrier existed between the defendant and the Shannon Copper Company. It seems to me that on that issue alone we would have the right to show—not the amount of compensation that was paid—we only wish to show that a consideration was paid to the defendant for the transaction of that particular work. We offer it also on the ground that it tends to show the defendant was in complete control of the tracks—both of the main line and of the Shannon smelter—from which no hair-splitting question should come up as to whether the accident occurred right at the switch or whether the accident was the result of negligence that occurred upon the main line.

The COURT.—The Court has indicated that it sees nothing objectionable in the question, except that the mere matter of pay does not decide the matter.

Mr. SEABURY.—Does it not tend to establish that these persons were engaged in the business of a common carrier for hire?

Mr. McFARLAND.—We admit that.

Mr. SEABURY.—But the admission has been withdrawn.

(Testimony of A. T. Thompson.)

Mr. McFARLAND.—We have admitted and stated the admission on several occasions, that we were common carriers, but we do not admit that we were engaged in interstate commerce in switching [283] those cars up the Shannon switch or switching them in our yards.

Mr. SEABURY.—But is it admitted that you were engaged as a common carrier in switching those cars up Shannon switch?

Mr. McFARLAND.—Yes. We admit as far as an admission can be understood that we were engaged then and have been engaged in the business of common carriers. Now, there is no qualification to that.

The COURT.—Then I think the question is unnecessary.

Mr. McFARLAND.—But as to whether we were engaged in interstate commerce or not—

The COURT.—That is a question of law, almost.

Mr. SEABURY.—I was about to say that. So may we proceed with the question, your Honor?

The COURT.—I think it is unnecessary under that admission.

Mr. SEABURY.—The admission does not go to the question whether they were involved in interstate commerce. I think we have it fixed that in this case they were engaged as a common carrier and in the act of a common carrier.

The COURT.—But the question of payment does not bear on that, for that might be another contract—the hauling that stuff up there might be another con-

(Testimony of A. T. Thompson.)

tract than that involved in bringing the cars into the territory from some point outside.

Mr. SEABURY.—But, if your Honor please—

The COURT.—I think the question whether or not this movement of cars was under the one contract would bear upon that question. Whether the parties treated the service under the original contract at an end at the time the cars reached the station at Clifton, and this matter of subsequently hauling cars up to the smelter could be said to be an independent and distinct transaction or contract than that which was involved in the bringing of [284] the cars in in the first instance, would be the determinative question.

Mr. SEABURY.—We respectfully contend in that respect that whether or not this defendant was then engaged in the act of interstate commerce is not dependent upon contractual relations of this defendant with the Shannon Copper Company. That is our contention. While the contract might establish it beyond any doubt, it might, nevertheless, be established whether any contract existed or not, or irrespective of the terms of that particular contract. For the evidence is that these were twelve cars some of which were the property of the Santa Fe and some of the Colorado and Southern; that they contained coke coming from outside of the territory, and that the defendant was engaged in the transmission of those cars from the main line up this switch, which would clearly establish an engagement in interstate commerce.

(Testimony of A. T. Thompson.)

The COURT.—Suppose there was another company that took those cars after their arrival at Clifton and hauled them up to the smelter—would that be an act of interstate commerce?

Mr. SEABURY.—I am frank to say I don't know. I think that it would. I think the authorities are to the effect that where cars are consigned to an individual at a certain place that the persons engaged in the delivery of those cars are engaged in interstate commerce until the consignee is reached, and the engagement in interstate commerce does not cease simply by the delivery of cars at the place at which the consignee resides or has his place of business.

Mr. BENNETT.—Then is it your idea that a railroad company may be engaged in interstate commerce whose line is wholly within a state or territory?

[285] Mr. SEABURY.—Most assuredly.

The COURT.—That was discussed in the Merger Cases before the Supreme Court of the United States. There seem to be considerable doubt in the mind of the judges and also in the mind of counsel as to those questions. I don't think it is settled.

(Thereupon the question is argued further to the Court by counsel, at the conclusion of which the Court says:)

The COURT.—Without taking up any more time in the discussion of this question, I will admit the evidence tentatively, and if the Court feels that it is proper hereafter after an examination of the law, it

(Testimony of A. T. Thompson.)

can be taken from the consideration of the jury, by proper motion.

Mr. McFARLAND.—We desire to except to the ruling of the Court.

(By Mr. KEARNEY.)

Q. Was any compensation paid to the defendant for taking those cars up the hill and delivering them to the Shannon Copper Company?

A. I don't think so.

Q. You think it was gratis?

A. I don't think so.

Q. Didn't they pay anything?

A. It all depends on the nature of the movement, Mr. Kearney, I can't give you yes or no to that question the way you put it, because I don't know.

Q. Was there any consideration for the moving of those cars? A. I don't think so.

Q. You think there was no consideration?

A. No consideration for that original switching movement, provided that was an original movement.

Q. Wasn't that part of the duty to take those cars up there?

A. On the original switching movement?

[286] Q. Don't you take freight up there for other persons? A. Yes, sir.

Q. You say you take freight up there for other persons besides the Shannon Company?

A. I didn't quite catch that.

Q. I say, don't you take freight up the hill for the Shannon Copper Company and to other persons than the Shannon Copper Company?

(Testimony of A. T. Thompson.)

A. Up to the Shannon Copper Company hill?

Q. Yes. A. Yes, sir.

Q. There is an oil company you deliver oil for?

A. Yes, sir.

Q. Sometimes goods are taken for the D. C. Company and transported?

A. That is a through movement up above.

Q. They are taken up on the track—that track is used to take them up? A. Oh, yes.

Q. Does the defendant's engines and crew of helpers take those up? A. Yes.

Q. In that way there is quite a lot of other freight that is taken up that switch that goes to divers persons?

Mr. McFARLAND.—We object. That is not the question before the Court as to what others did, but as to the particular Shannon Company.

The COURT.—The practice of the company might bear upon that point.

Mr. McFARLAND.—As to whether they were paid or not?

[287] The COURT.—Oh, no. The question is as to the practice of the company in hauling other loads up the hill.

Mr. McFARLAND.—We except.

(Thereupon at request of counsel reporter reads the last question propounded to the witness.)

The WITNESS.—There is other freight. I wouldn't say a lot.

(By Mr. KEARNEY.)

Q. It goes to divers other persons?

(Testimony of A. T. Thompson.)

A. Yes, sir.

Q. Is this freight called foreign freight that comes in from outside of the territory or State?

A. It might be.

Q. Isn't it a fact that most all of it is? Do you get any wholly within the territory or State?

A. No, I don't think so. Most of the oil is interstate.

Q. Then you do take up a large amount of that, don't you?

A. Take up all that goes to the Texas Oil Company's plant up there.

Q. The Texas Oil Company has a plant up there?

A. Yes.

Q. Isn't it a fact they ship in a large amount of oil?

A. Quite a quantity—I don't know the tonnage they ship in.

Q. The fact is the Shannon Copper Company is what they call a large plant, isn't it?

A. Yes, sir.

Q. Who owns the Shannon switch running up to the Shannon Copper Company smelter—who owns that strip of railroad?

A. You ask me who owns the switch or the strip of railroad?

Q. The railroad.

A. The railroad is owned by the Copper Company from the switch to the Shannon plant.

[288] Q. Was it so owned on March 15th, 1911?

Mr. McFARLAND.—We object to the question.

(Testimony of A. T. Thompson.)
It is alleged that it is the property of the defendant. They can't prove one fact and allege another.

The COURT.—I don't know from the question what they are going to prove. They may be going to prove what they alleged in the complaint.

Mr. McFARLAND.—We except to the ruling of the Court.

(Thereupon at request of counsel the reporter reads the last question propounded.)

The WITNESS.—So far as my knowledge goes.

(By Mr. KEARNEY.)

Q. Didn't the defendant in this case own an interest in that railroad? A. No.

Q. But they used it and controlled it at that time?

A. They used it—they had no control over it.

Q. All the engines that went up there went up there with the engines of the defendant and their employees operating those engines? A. Yes, sir.

Q. So they were the only ones using that then—the defendant's employees and their engines?

A. I don't know that they were the only ones using it.

Q. The only ones using it on the broad gauge?

A. On broad gauge, yes.

Q. So all foreign cars with broad gauge had to be taken up there by the defendant in this case?

A. Yes, sir.

Q. And were taken up by the defendant?

A. Yes, sir.

[289] Q. Now, isn't it a fact that when the defendant took cars up there, that they took them up with

(Testimony of A. T. Thompson.)

their own crews, and that they were in control of the switch and of that road in moving those trains?

A. Yes, sir.

Q. It is a fact? A. Yes, sir.

Q. What is the length of that Shannon switch up to the Shannon smelter? A. I don't know.

Q. Do you know whether it is a mile or a half a mile?

A. Oh, I should probably say it was probably about between three quarters and a mile.

Q. And is the Shannon Copper Company and all of that switch railroad within the corporate limits of the town of Clifton?

A. So far as my knowledge goes, yes. I never looked at the map, but I should say from a general idea, yes.

Q. You have lived at Clifton a good many years?

A. Yes, sir.

Q. What arrangements, if any, was there between the Shannon Copper Company and the defendant—was the defendant permitted to use that track to take cars up there?

Mr. BENNETT.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—There is an allegation in their complaint here directly on that point (reading): "Said switch line of railroad during the time herein mentioned was in use of defendant as part of its said railroad." I think they have a right to prove that.

Mr. BENNETT.—They are going again into the question of compensation.

(Testimony of A. T. Thompson.)

[290] The COURT.—The question doesn't necessarily apply to compensation.

Mr. BENNETT.—No, it does not, but I took it so to mean.

The COURT.—You may answer.

Mr. BENNETT.—We except.

The WITNESS.—It was the same as any other industrial siding put in there to connect up an industry with the main track. Outside of that there was no other arrangement.

(By Mr. KEARNEY.)

Q. Well, what was such arrangement as you had with every other industrial concern—what was the substance of it, briefly?

A. An arrangement regarding the delivery of cars governed by published tariffs of the company. They publish a terminal tariff that gives the rates for switching or what delivery they are going to make on an industrial siding on the original movement of the cars, and that constitutes the only contract which is a published contract.

Q. The fact is there is an established rate for the switching of these cars on the siding?

A. When you say these cars you mean these specific cars?

Q. I mean any cars brought up there, including these cars. All cars.

A. I will explain the arrangement. A car is brought in—what we call the original movement of the car—to make delivery of the original movement of the car—a carload of freight. If it is consigned to

(Testimony of A. T. Thompson.)

some consignee who has an industrial track the delivery is made on that industrial track—no additional charge made for the movement of that car at all. But if the car is brought into Clifton and then switched around after being placed at the original unloading point, if there is a further [291] switching movement of that car then we make a charge for that movement or any subsequent movement.

Q. But in this instance your charges for bringing the cars in fror your road, that came up here from Hachita into Clifton, and doing the switching and taking them out on this industrial track to the Shannon Copper Company, the first charge included the extra service of switching them?

A. For the original movement, yes, sir.

Q. All considered as one? A. Yes, sir.

Q. Then the destination of the cars would not be deemed completed until delivered to the consignee, in this instance the Shannon Copper Company on the hill?

Mr. BENNETT.—That is a question of law, we think, and not for the witness to answer. He has stated the fact.

The COURT.—He may state what the practice is and how they regarded the contract—how they construed the contract. I don't see how the Court could determine that without the aid of some proof on the subject.

Mr. BENNETT.—The witness has testified what the contract is and what they do.

The COURT.—Yes, that may be true—he has

(Testimony of A. T. Thompson.)
stated what the practice is.

(To the Witness.)

Q. You say there was no other published contract aside from what you speak of in the tariff—what do you call it?—the tariff sheet.

A. The terminal tariff was what I referred to.

Q. Aside from that there is no other written agreement? A. No, sir.

[292] Mr. KEARNEY.—I asked the witness to state if the compensation in the first instance for moving the cars from Hachita over the line of the road was not also included in the delivery of the car upon this siding—upon this switch—to the Shannon Company.

Mr. BENNETT.—And we object to that as already asked and answered.

The COURT.—He has answered it. You are asking this witness to decide this point of law.

(By Mr. KEARNEY.)

Q. Is the original movement of the car also included within the delivery on the switch?

Mr. BENNETT.—We object to that as calling for a question of law.

The COURT.—Whether the contract—

Mr. KEARNEY.—No, the original movement. He has testified that they have two kinds movements. What we seek to find out from this witness is whether or not the delivery of these cars on the industrial siding of the Shannon Copper Company was included within the contract involving the original movement of those cars.

(Testimony of A. T. Thompson.)

The COURT.—He may state whether it was treated as such by the company.

The WITNESS.—Say those cars are shipped from Gray Creek, Colorado, to Clifton, Arizona. The freight rate applied would be in a certain tariff which is on file with the Commission—in a different tariff—and the terminal tariff would be the charges or arrangements with reference to this switching. The original tariff, if you were to look up to find out a rate from Gray Creek, Colorado, to Clifton, would give the through rate, and then if you wanted to find out whether they had to pay an additional [293] charge to get those cars switched to an industrial siding, you would have to refer to the terminal line's terminal tariff to ascertain that, because all roads don't perform that service. Some do and some don't.

Q. Both classes of tariff are regulated by the interstate commerce commission, are they not?

A. My opinion is they are.

Q. And that applies, as you have said, to both terminal roads and other roads. What we want to find out, Mr. Thompson, is whether the delivery of these particular cars on the 15th of March, 1911, was a part of the original movement of these cars as you have described here, and whether the rate applicable to the original cars under the original movement applied to these cars or not.

A. On account of our terminal tariff providing that the original movement provided we would deliver to the industrial track without charging anything ad-

(Testimony of A. T. Thompson.)
ditional, we made it a part—linked it to the other tariff providing the rate from the point of origin to point of destination.

Q. So the fact is your delivery was not complete until you delivered to the industrial siding of the Shannon Copper Company.

A. It was optional with the Shannon Company whether they accepted delivery anywhere provided in that tariff.

Q. But in this instance, March 15th, 1911, defendant undertook to make delivery up that switch. They can't be any doubt or dispute about that, can they?

A. No, that is where we were going to make delivery.

Q. And when you say the defendant received no compensation for the delivery, you meant it received no specific compensation for going from the switch up to the smelter?

[294] A. Yes, we received no compensation on that original movement.

Q. You received one general compensation which included the so-called original movement of the car and which included the delivery to the smelter.

A. I don't say the rate we make from Gray Creek to Clifton takes into consideration any terminal switching—a remuneration to the terminal line for switching.

Q. No, I understand—

A. I thought that is what you meant.

Q. You do not, however, claim that the defendant

(Testimony of A. T. Thompson.)

received any compensation for the delivery of that movement of cars to the Shannon Company?

A. We delivered it free.

Q. But you received your compensation from the shipper?

A. We received our division of the through rate between the point of origin and destination.

Q. Yes, compensation was paid for that delivery.

A. I don't understand you. If you mean was there any additional compensation or any portion of the original rate applied to that service—

Q. No such question, Mr. Thompson. The question I am trying to get an answer to is this: Did the defendant receive compensation from someone for the delivery of those cars up to the Shannon Smelter?

Mr. BENNETT.—I think the witness has answered that question. He has said the rate from the initial point of shipment was included in the through rate, and they made delivery without charge.

The COURT.—Yes, you are asking him to draw an inference which the Court and jury is to draw.

Mr. SEABURY.—I think it is perfectly clear from this witness' [295] testimony what the arrangement was, but I don't want to leave it in any doubt.

(To the Witness.)

Q. I ask you, Mr. Thompson, whether you know—in March, 1911, did the defendant ship any freight from the Shannon Smelter out of the Territory?

A. Yes, sir.

Mr. McFARLAND.—That is not involved in this

(Testimony of A. T. Thompson.)

controversy. We object to the question.

The COURT.—I overrule the objection.

(By Mr. SEABURY.)

Q. You have been in attendance upon the trial right along? A. Yes, sir.

Q. Have you heard the cars described which were involved in this collision on the 15th of March, 1911?

A. Yes, sir.

Q. You know from whence they came?

A. You mean the shipping point?

Q. Yes. Do you know where they came from?

A. From the evidence, from Gray Creek, Colorado—that is what I gathered from the evidence.

Q. Do you know anything about where they came from?

A. I think very likely they came from Colorado, but I haven't looked up the way-bills at all.

The COURT.—Are you through with the witness?

Mr. SEABURY.—Yes, your Honor.

Cross-examination.

(By Mr. McFARLAND.)

Q. Isn't this industrial switch that you speak of from the main line up to the Shannon smelter used in switching cars from [296] the main line and from the yards of the defendant up to the Shannon smelter?

Mr. KEARNEY.—We object to the question on the ground that it is not rebuttal. I called the witness for cross-examination.

The COURT.—It is not cross-examination except in the sense that you are permitted to apply the rules

(Testimony of A. T. Thompson.)

of cross-examination. Cross-examination, strictly speaking, pertains to something that has already gone in evidence.

Mr. SEABURY.—We think the question if admissible at all, should be addressed to the witness when called in behalf of the defendant and not on behalf of the plaintiff.

The COURT.—They may be making him their own witness for this point. They may interrogate him now, if they wish. Of course you make the witness your own witness.

(Thereupon at the request of counsel the reporter reads the last question propounded.)

The WITNESS.—Yes, it is so used.

(By Mr. McFARLAND.)

Q. The switching operation on this industrial spur or switch, is that done by the switching crew?

A. Yes, sir.

Q. You have two crews on the railroad, one a train crew and one a switching crew? A. Yes, sir.

Q. And when cars are brought in from the outside the train crew has nothing further to do with them after they are landed in the yards?

Mr. SEABURY.—We make the same objection.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except to the ruling of the Court.

[297] (By Mr. McFARLAND.)

Q. After the train is brought into the yards of the company at Clifton the train crew have nothing further to do with the train? A. No, sir.

(Testimony of A. T. Thompson.)

Q. Then it is turned over by that crew to the switching crew, isn't it?

Mr. SEABURY.—We object.

The COURT.—I think he has already answered that question.

By Mr. McFARLAND.—All right. I withdraw that.

(To the witness.)

Q. You have yard limits up there? A. Yes, sir.

Q. The switching from the main line up this industrial spur to the Shannon smelter is within the yard limits of the defendant at Clifton?

A. Yes, sir.

Mr. SEABURY.—We object to all these questions as leading. I understand this witness is really under direct examination.

The COURT.—It is leading, but a physical fact like that would not be probably suggested by any question of this sort. It is not probable that the witness would misrepresent anything of that sort, under the circumstances.

Mr. SEABURY.—We make the objection more for the questions that might follow.

Mr. McFARLAND.—I think that is all.

(Witness excused.)

The COURT.—We will take a recess until half-past one o'clock and meanwhile the jury will bear in mind the admonition of the Court not to suffer anyone to talk to you about the case or to talk about it among yourselves.

[298] (Thereupon the Court takes a recess.)

(Testimony of Mrs. Thomas P. Clark.)

At one-thirty P. M. this day, both parties being present, the plaintiff in person and by his counsel, and the defendant by its counsel, the jurors return into court and are called by the clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

[Testimony of Mrs. Thomas P. Clark, for Plaintiff (Recalled).]

Mrs. THOMAS P. CLARK, being recalled to testify as a witness in behalf of the plaintiff after having been heretofore duly sworn in this case, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name?

A. Mary Josephine Clark.

Q. You are the wife of Thomas P. Clark, the plaintiff in this action? A. I am.

Q. How long have you been married to Mr. Clark?

A. I think it is nearly seventeen years.

Q. You remember the 15th of March, 1911?

A. Yes, sir, I do.

Q. Please tell us what occurred on that day with reference to Mr. Clark.

A. I was sitting in my house—I heard a slight noise on the front walk and I looked out and I saw Mr. Clark approaching, hardly able to walk, apparently. I went out to him. I asked him what was the matter and he said that he had got hurt—

Mr. McFARLAND.—We object to any conversation. Let her state what she saw and what she

(Testimony of Mrs. Thomas P. Clark.)

knows. We object to any conversation.

The COURT.—Yes, as to the cause of the accident. As to the plaintiff's physical condition, that is admissible.

[299] Mr. McFARLAND.—Yes, but as to any conversation on that subject—

The COURT.—On what subject?

Mr. McFARLAND.—On the subject of his injuries—what he told her on the subject.

The COURT.—As to the cause of them, yes, but not as to how he felt and all that. I think that is admissible—part, almost, of the *res gestae*.

Mr. McFARLAND.—We except as to the conversations.

The COURT.—Of course, Judge, I don't rule that conversations as to the cause of the accident may go in, but simply what he may have said about his condition.

(By Mr. SEABURY.)

Q. Try to tell us what you observed with reference to him as distinguished from what he may have said to you.

A. He was very pale and I went to him and assisted him up the steps. I proceeded at once to get some water and bathe his face and take off the engine grime and dirt and his overclothes.

Q. Did you bathe him after that? A. Yes, sir.

Q. What else did you do?

A. I helped take off his clothing to be examined. Dr. Dietrich came on the scene and he proceeded to make an examination upon which Mr. Clark fainted

(Testimony of Mrs. Thomas P. Clark.)

dead away. Dr. Dietrich and myself got him to the bed.

Q. Now, Mrs. Clark, will you tell us whether or not you observed any inflammation in his left eye or either eye?

A. The eye was quite red and there was some blood on the cheek under the eye.

Q. Could you say from what portion of his face the blood came?

[300] A. Well, it was on the left side of the face.

Q. Was there any cut on his face?

A. Not that I remember.

Q. What was the appearance of the eye?

A. It looked red.

Q. Did there appear to be any blood in the eye at that time?

A. Well, I think there was a small amount of blood.

Q. What did you observe with reference to his head, if anything?

A. Well, I can't say at that time that I noticed anything very particular about the head.

Q. Did you or did you not observe whether it had been cut? A. No, sir, I did not.

Q. Are you able to say whether it had struck anything or not?

A. Well, there was a lump on the back of the head.

Q. There was? A. Yes, sir.

Q. Did you feel that yourself? A. I did.

Q. Had it been there before? A. No, sir.

Q. What did you do for him that day after he had gone to bed?

(Testimony of Mrs. Thomas P. Clark.)

A. I made him as comfortable as I knew how. I sponged him and sat there beside him. During the night he was delirious—not all the time—his sleep was broken and flighty.

Q. How long did that condition last?

A. That lasted all through that night.

Q. What took place the next day?

A. I had a trained nurse by half-past ten or eleven next day.

Q. What was her name?

[301] A. Rebecca Manes.

Q. She remained with him in attendance with you for how long about? A. For eight days.

Q. When did Mr. Clark get up after he went to bed on that occasion?

A. I think it was very near a week at which time he was permitted to sit up a little while.

Q. Did pneumonia develop? A. Yes, sir.

Q. When did it develop?

A. It was either the second or third day after the accident.

Q. What was done to Mr. Clark during that period of time in the way of treatment, if you know?

A. The first three days?

Q. Yes.

A. I don't remember whether they bandaged the ribs in the first three days or not, but I think probably.

Q. How was he bandaged during that time?

A. With adhesive plaster.

Q. Over what portion of his body?

(Testimony of Mrs. Thomas P. Clark.)

A. Down over the floating ribs.

Q. On which side?

A. All around, the bandages were put.

Q. Did he have any other treatment that you recall in the early stages of his difficulties?

A. The nurse continued the treatment I had commenced with regard to the eye. I bathed it with a solution of boracic acid. The next morning after the accident it was a hard matter to get the eye open. It took quite a long time to bathe it in order [302] to do so.

Q. What was the condition of the right eye at that time, do you recall? Was it open or closed?

A. It was open.

Q. About how long did the treatment of pneumonia continue, do you recall?

A. Well, it must have been five days, I think.

Q. About five days? A. I think so.

Q. During that time was Mr. Clark conscious all the time?

A. Pretty much all the time. There were times at night he was a little flighty.

Q. Do you recall about when he began to sit up?

A. I think it was about the sixth day.

Q. Do you recall his reading part of the time when he was sitting up?

A. It was when he commenced to sit up that he asked for a paper.

Q. And about how much reading, if you know, did he do from then on?

A. Well, a little. He would be restless in bed and

(Testimony of Mrs. Thomas P. Clark.)
would ask for the paper or something to look at. He was very restless.

Q. Do you recall whether or not he ever complained to you with reference to pain from his eye?

A. He certainly did.

Q. Do you recall when that was?

A. He complained the first day.

Q. He did? A. Yes, sir.

Q. Did he frequently refer to it, too?

[303] A. Yes, sir.

Q. Now, after he was able to sit up, do you recall how long it was before he was able to go out, or did he go out?

A. I think it must have been more than two weeks or such a matter that he went out. He went out in the yard and walked a little while.

Q. What, if any, differences did you observe in his general appearance and health after he went out after the accident and before it occurred?

A. After the accident and since he has never regained his usual voice at all.

Mr. McFARLAND.—Regained what?

The WITNESS.—His usual voice.

(By Mr. SEABURY.)

Q. What other differences?

A. He suffers from the pain in the chest and side and back, and also in the hip.

Q. Do you recall Mr. Clark's ever having been ill during the thirteen years preceding this accident?

A. No, sir, Mr. Clark never was ill.

Q. During that time? A. During that time.

(Testimony of Mrs. Thomas P. Clark.)

Q. You have been with Mr. Clark continuously since the accident, too, haven't you? A. I have.

Q. Has he ever received any other injury than those he received on the occasion of this accident since? A. No, sir.

Q. Has he been employed at any time since the accident, Mrs. Clark? [304] A. No, sir.

Q. Do you know whether or not he has made any efforts to secure employment?

A. I don't think that he has. I am sure that he hasn't.

Q. You don't think that he has?

A. No, sir. He is not able, I should judge.

Q. Do you recall what expenditures you or Mr. Clark made on account of his injuries since the accident?

Mr. McFARLAND.—I think that should be limited to what Mr. Clark expended.

The COURT.—If she knows of her own knowledge.

(By Mr. SEABURY.)

Q. I will put it what Mr. Clark expended, then.

A. To the best of my knowledge I can't say accurately.

Q. You know of certain payments having been made? A. Yes, sir.

Q. Please tell us of those you do recall.

A. There was Dr. Cathcart in El Paso.

Q. Do you recall how much was paid to him?

A. I can't say exactly, but I think between twenty-three and thirty dollars.

(Testimony of Mrs. Thomas P. Clark.)

Q. It was at least twenty-three dollars, was it not?

A. Yes, sir.

Q. What other payments do you recall?

A. Dr. Fayles.

Q. How much was he paid?

A. Two hundred and twenty-five dollars.

Q. How much?

A. Two hundred and twenty-five.

Q. Any others that you recall?

[305] A. Dr. Burns, of Los Angeles.

Q. How much was he paid?

A. About twenty-five dollars, I think.

Q. Anything else?

A. Dr. Satterlee of El Paso.

Q. How much was he paid?

A. Between thirty and thirty-two; such a matter, I believe.

Q. Anyone else that you recall?

A. Dr. Kendall.

Q. How much was he paid?

A. I don't know exactly. I think twelve or fifteen dollars.

Q. Would it be at least twelve? A. Yes, sir.

Q. Anyone else that you recall?

A. The nurse was paid.

Q. That is Mrs. Manes? A. Yes, sir.

Q. How much was she paid?

A. Twenty-five dollars and forty cents.

Q. Do you recall anyone else?

A. Dr. Birch, nine fifty.

Q. Any others?

(Testimony of Mrs. Thomas P. Clark.)

A. There was the expense of going to California.

Q. What does that amount to?

A. Well, without the living expenses, I suppose in the neighborhood of two hundred and fifty or sixty dollars.

Q. Whereabouts in California did you go?

A. To San Francisco.

Q. Why did you go to San Francisco?

A. The Doctor advised that Mr. Clark be taken away from the [306] scene of his accident in order to regain his nerves and to improve.

Q. What, if any, suggestion did he make as to the place he should go?

A. Well, I don't remember, except to go to California.

Q. When was that that he went to California?

A. I think it was in August, 1911, that the first trip was made.

Q. How long did you remain?

A. I think about four months.

Q. Then where did you go?

A. I returned to our home in Clifton.

Q. Did you subsequently return to California?

A. Yes, sir.

Q. Whereabouts in California did you go back to?

A. I went back to San Francisco again.

Q. When was that, Mrs. Clark?

A. I think that we left Clifton on June 14th or 15th, 1912.

Q. And when did you return?

A. Well, I think October 24th, or 25th.

(Testimony of Mrs. Thomas P. Clark.)

Q. Was the expense of the latter trip included in this sum of two hundred and sixty dollars?

A. Yes, sir.

Q. Now, during that time were you still in attendance on Mr. Clark? A. Yes, sir.

Q. Were there any other items of expense that you recall that Mr. Clark paid out on account of this injury?

A. Yes, there were drugs at different times.

Q. What do you think those payments amounted to?

[307] A. Well, at different times, I think, to seventeen or eighteen dollars.

Q. Anything else?

A. That is all I think that I remember.

Mr. SEABURY.—I think that is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. You didn't see Mr. Clark at the time of the accident? A. At the scene of the wreck?

Q. Yes. A. No, sir.

Q. And didn't see him until after he came home?

A. Not until he came in the yard.

Q. Did anyone assist him after he got into the yard to walk into the house? A. Only myself.

Q. Just yourself? A. Yes, sir.

Q. He didn't walk any part of that way himself, from the front part of the yard to the house?

A. Part of the way he walked by himself; yes, sir.

Q. Dr. Dietrich was there the first day, was he?

A. Yes, sir.

(Testimony of Mrs. Thomas P. Clark.)

Q. Was he the physician who treated him in his trouble? A. Yes, sir.

Q. Were you present at any time when Mr. Clark and Dr. Dietrich were talking about his bruises and injuries?

A. I didn't hear Dr. Dietrich mention his bruises.

Q. Did you hear Mr. Clark tell Dr. Dietrich about his troubles? A. I did not.

[308] Q. About his broken ribs or about his injury to his hip? A. He spoke about—

Mr. SEABURY.—Never mind what he spoke about. Just answer the question, Mrs. Clark. Please don't tell him anything except the answer to the question. He has only asked whether you were present.

(Thereupon at the request of counsel, the reporter reads the following: Q. Did you hear Mr. Clark tell Dr. Dietrich about his troubles? A. I did not. Q. About his broken ribs or about his injury to his hip?)

Mr. SEABURY.—We object to that as calling for the conversation of the witness and the physician which would not be binding upon the plaintiff, and as also calling for the conversation between the plaintiff and his physician, admittedly relating to the subject of his injuries, which is a privileged communication.

The COURT.—It would be so far as the doctor is concerned, but not so far as third persons are concerned.

Mr. SEABURY.—That is true, but it appears that this third person is the wife of the person whose ad-

(Testimony of Mrs. Thomas P. Clark.)

mission is sought to be proved. We claim further in that respect that it is practically a communication between husband and wife.

The COURT.—Don't you think the party may be asked himself what he said to the doctor?

Mr. SEABURY.—No, I don't, under proper objection. I think that is the very purpose of the statute, to save patients from the disclosure of their communications between themselves and their professional advisers, either lawyers or doctors.

The COURT.—I have no doubt that the physician may not be interrogated except by consent of the patient—testify as to professional communications; but the fact may be otherwise shown, [309] of course—it may be without violating that rule.

Mr. SEABURY.—We also object on the additional ground that this is not within the scope of proper cross-examination—no such conversations were elicited from the witness on direct examination.

The COURT.—She was interrogated as to what—

Mr. SEABURY.—Only what she oberved—not as to any statements made between doctor and patient.

The COURT.—She was interrogated, though, as to what Mr. Clark may have stated to her. However, the objection is sustained. I don't think that is proper cross-examination.

Mr. McFARLAND.—To which we except.

(To the Witness.)

Q. Mrs. Clark, were you present at any time that Mr. Clark made a statement—any statement—to Dr. Dietrich in reference to his physical injuries re-

(Testimony of Mrs. Thomas P. Clark.)

ceived as a result of that accident?

Mr. SEABURY.—We object. The question calls for a statement by the witness practically of that portion of the conversation—in other words, the substance of the conversation was given—were you present at the time a conversation relating to this subject was had?

Mr. KIBBEY.—Why not?

Mr. SEABURY.—The contention is that the witness is incompetent to testify to it.

Mr. KIBBEY.—Of course, Clark himself can't claim the privilege that he can't be interrogated about it—the statute doesn't exempt him—he is not privileged from disclosing it—it is applicable purely to the physician.

The COURT.—That is my understanding of the rule.

Mr. KIBBEY.—If we can prove otherwise that he made statements [310] to the doctor in the presence of someone else, it would not be a privileged communication. In the second place, we have a right to ask him these questions; we have a right to ask her the question as to what statements he might have made to the doctor in her presence, or whether she heard any statements made by the plaintiff to the doctor in her presence and in the presence of the doctor. She was asked about complaints made to her, and we have a right to go still further. The objection can't be that it is a communication between husband and wife—they have opened the door for this.

(Testimony of Mrs. Thomas P. Clark.)

Mr. SEABURY.—We still further urge the objection first on the ground that it is not proper cross-examination—

The COURT.—I think that objection is good, unless she was interrogated as to what he may have said about his physical condition.

Mr. SEABURY.—I think there is no such inquiry in the direct examination.

Mr. KIBBEY.—We are inquiring about statements made by the plaintiff, a party to this suit.

The COURT.—But she has not been interrogated as to that. You would have to make this witness your own as to that matter unless it is proper cross-examination.

Mr. KIBBEY.—We except to the ruling of the Court.

The COURT.—If that question was asked, it is cross-examination. If she was asked as to what statement she may have heard the defendant make—the plaintiff—not what he may have said to her, but what he may have said as to his physical condition.

Mr. McFARLAND.—In her presence.

The COURT.—Yes—then cross-examination is proper on that subject.

[311] Mr. KIBBEY.—That is what we are asking.

The COURT.—That matter was denied, and I took it for granted you conceded that. Do you claim, Judge Kibbey, that the record shows she was interrogated as to statements Clark may have made generally?

(Testimony of Mrs. Thomas P. Clark.)

Mr. KIBBEY.—As to pain and suffering, yes.

The COURT.—I didn't so understand. Mr. Seabury raised the issue as to that and I thought it was conceded he was right. I said repeatedly that if she was so interrogated that is cross-examination, otherwise it is not. Now, what is the record as to that?

Mr. KIBBEY.—My understanding of the record is that he did make complaint as to pain and suffering.

Mr. SEABURY.—My distinct recollection of the question is, what, if any pain did he express to you? That is my recollection of the substance of all her examination. I certainly didn't endeavor to prove by this witness anything that took place between Mr. Clark and the doctor. I have asked her to give only her personal observation of what she observed with reference to his physical condition after the accident.

Mr. KIBBEY.—The Court declared the rule to be that it was part of the *res gestae.*

Mr. SEABURY.—I modified my question and asked her to tell what she observed as to his physical condition. I didn't mean to extend the examination to let in questions about conversation with other persons. I feel quite confident that is the condition of the record.

The COURT.—I will ask the reporter to read the first part of Mrs. Clark's testimony.

(Thereupon the reporter reads the first part of direct examination of the [312] witness, Mrs. Thomas P. Clark.)

The COURT.—I sustain the objection that it is

(Testimony of Mrs. Thomas P. Clark.)

not proper cross-examination.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Did I understand you to say in your examination in chief that Mr. Clark complained of any pain in his eye or other wounds received in that accident?

A. Yes, sir.

Q. You did say that, in your examination in chief?

A. I don't quite understand.

Q. You did make that statement in reply to questions asked by Mr. Seabury?

A. That he had pain?

Q. Yes.

The COURT.—(To the Witness.) The question is whether you have stated in your examination up to this time— (To Counsel.) What is the purpose of that, Judge McFarland?

Mr. McFARLAND.—To show the condition—

The COURT.—We have just read the record and the Court has just ruled on that point.

(Thereupon the reporter at the request of counsel reads the latter portion of the direct examination of the witness, Mrs. Thomas P. Clark, including the following: Q. (See page 169.) Do you recall whether or not he ever complained to you with reference to pain from his eye? A. He certainly did.)

The COURT.—You may put another question. This statement pertains to the condition of the eye. The Court will then rule again upon that matter.

(Testimony of Mrs. Thomas P. Clark.)

(By Mr. McFARLAND.)

[313] Did Mr. Clark in your presence complain —in your presence and in the presence of Dr. Dietrich—complain about any pain in the eye during the first week of his illness at your house?

Mr. SEABURY.—We object to the question on the ground that it is not proper cross-examination.

The COURT.—I overrule the objection as to that.

Mr. SEABURY.—Also on the grounds already urged.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except to the ruling of the Court.

The WITNESS.—I don't remember.

By Mr. McFARLAND.—Were any statements made by Mr. Clark in the presence of yourself and Mrs. Manes as to pains in his eye?

A. As far as I remember he complained of that pain in the eye.

Q. I speak, Mrs. Clark, particularly in reference to the presence of Mrs. Manes, the nurse.

A. As far as I remember, he did.

Q. He did?

A. I think so. I wouldn't be positive of it.

Q. Wasn't it discussed there in the presence of the nurse and Dr. Dietrich and yourself?

Mr. SEABURY.—We object to the question as not proper cross-examination and as calling for a statement of conversations between physician and patient during the existence of the relation, and while it is apparent the conversation must have been

(Testimony of Mrs. Thomas P. Clark.)

necessary to enable the physician to treat the patient, and that the physician received the information while the relation existed, in violation of the statute.

The COURT.—I overrule the objection.

[314] Mr. SEABURY.—We except.

The WITNESS.—I can't recollect. I don't remember what the conversation was, or if there was any, to the doctor.

(By Mr. McFARLAND.)

Q. You won't say there was no conversation along those lines in the presence of these people?

A. I wouldn't like to say. I don't remember whether there was or not.

Q. Did Dr. Dietrich continue to treat him until he was up out of his bed and out of the house?

A. Yes, sir.

Q. Was he treated by any other physician except Dr. Dietrich?

A. No, sir, except one time Dr. Smith was called in in the absence of Dr. Dietrich.

Q. That was only one time?

A. That is all that I remember.

Q. Were you present at that time?

A. I was in the next room.

Q. You knew that Dr. Smith was in there?

A. Yes, sir.

(Testimony of Mrs. Thomas P. Clark.)

Q. Did you hear the conversation between Dr. Smith and Mr. Clark, if any conversation occurred?

Mr. SEABURY.—We object to the question as not proper cross-examination.

The COURT.—The objection is sustained to that.

(By Mr. McFARLAND.)

Q. You say that Dr. Dietrich bandaged his ribs? Did I understand you correctly in that respect to that? A. Yes, sir.

Q. And treated him for those broken ribs?

[315] Well—

Q. Or injured ribs, as the case may be? Did you answer? A. I suppose so.

Q. He also treated him for pneumonia if he had pneumonia, did he?

Mr. SEABURY.—We object to the question. It is argumentative in form—hypothetical. Improper in form and not proper cross-examination. We haven't attempted to show what the treatment was. She testified what she did to him practically as a nurse.

The COURT.—Wasn't she interrogated with regard to what medical attendance he had?

Mr. SEABURY.—I think she was.

The COURT.—Then this would be cross-examination. I overrule the objection.

Mr. SEABURY.—We except.

(Thereupon at request of counsel the reporter reads the last question propounded.)

The WITNESS.—Yes, sir.

(Testimony of Mrs. Thomas P. Clark.)

(By Mr. McFARLAND.)

Q. Also any bruises or trouble with his hip and back? A. Yes, sir.

Q. All those treatments were successful?

A. Well, the nurse had charge of Mr. Clark during this time. I wasn't present all the time. I was sick myself. The nurse had charge of Mr. Clark.

Q. After this treatment he got up and was out?

Mr. KEARNEY.—We object to the question as not cross-examination.

The COURT.—She may answer that question.

[316] The WITNESS.—It was a couple of weeks or such a matter before he was allowed to go out.

(By Mr. McFARLAND.)

Q. I understood you to say in your examination that he walked around in the yard.

A. After the examination?

Q. In your previous testimony. In answer to some questions asked you by Mr. Clark's counsel you said, if I remember, that in about two weeks he walked out in the yard.

A. He walked out a little while in the yard.

Q. He has not been confined to his bed since that, has he?

A. Not all the time, but a good part of the time. He couldn't sit up all day.

Q. In the last year has he been confined to his bed?

A. Some times during the day. He isn't able to sit up all day.

Q. As a rule, doesn't he walk around town and

(Testimony of Mrs. Thomas P. Clark.)

other places where he happens to be, at his will and pleasure? A. Yes, he goes down town.

Q. Do you notice any difference in his walking around now and before the accident?

A. I certainly do.

Q. In what respect?

A. He is feeble now. He has no strength, apparently.

Q. But he does go around unassisted anywhere he wants to go?

A. Yes, I think he is able to take care of himself.

Q. He doesn't walk with a cane, does he?

A. No, he doesn't yet, not that I know of.

Q. Otherwise, than you say he is weak, you see no difference in his condition now and before the accident.

[317] A. There is a decided difference in his condition now and before the accident.

Q. In what respect? A. He is weak.

Q. I say, other than that there is no difference.

A. Yes.

Q. What?

A. He complains of his side all the time. He complains of this pressure here (indicating chest) which on the least exertion he has to cough.

Q. Does he cough when he is walking around town? A. Sometimes.

Q. Are you with him on those occasions?

A. Sometimes I am and sometimes not.

Q. You only know when you are present?

(Testimony of Mrs. Thomas P. Clark.)

A. He would prefer that I go with him all the time.

Q. As a matter of fact, you don't go with him all the time? A. I do not.

Q. So you don't know what occurs when you are not with him?

A. I can't say that I do, exactly.

Q. Now, you say there was a lump on the back of Mr. Clark's head the day immediately after the accident—a lump on the back of his head.

A. I didn't notice that immediately after the accident.

Q. Sometime that same day?

A. Along in the night, I believe.

Q. Now, I understand you to say that lump was not there the previous day. A. It was not.

Q. Now, will you explain to the jury how you knew that lump [318] was not there the previous day or previous to that?

A. I know this: That I almost always got Mr. Clark ready to go out. I generally comb his hair. That is how I know the condition of his head.

Q. You always combed his hair?

A. Most always; not always. Especially in the morning when he was in a hurry I got him ready so he was always on time.

Q. Now, did that preparation consist of anything except combing his hair?

A. I helped him on with his engine clothes and prepared him for the day.

Q. And you are quite positive that the day pre-

(Testimony of Mrs. Thomas P. Clark.)

vious to the accident you combed his hair and didn't see any trouble with the back of his head?

A. Yes, sir.

Q. Quite sure about that? A. Yes, sir.

(By Mr. KIBBEY.)

Q. How frequently did Dr. Dietrich visit there the first eight days? A. How often, do you say?

Q. Yes.

A. Well, the first day I think he was there probably three or four times.

Q. And the next day? A. Probably the same.

Q. And the next? A. That I couldn't say.

Q. But he did visit on each of those days for the first eight days? [319] A. Yes, sir.

Q. Now, you were present at those visits?

A. Not always, no. I was confined to my bed most of the time.

Q. Were you within hearing distance?

A. Yes, sir.

Q. You could hear if there was any conversation between Dr. Dietrich and your husband?

A. Well, I —(hesitating).

Mr. KIBBEY.—That is all.

(The witness is excused.)

Mr. SEABURY.—Plaintiff rests, if your Honor please.

The COURT.—We will take a recess for five minutes—meanwhile, gentlemen of the jury, don't talk about the case among yourselves or with anyone else. Come back in five minutes.

(Thereupon the Court takes a recess.)

At two-forty P. M., the plaintiff being present in person and by his counsel and the defendant by its counsel, the jurors return into court and are called by the clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

Mr. McFARLAND.—We desire at this time to make a motion and now move the Court to direct a verdict for the defendant on the ground that it is not shown that at the date of the accident that the defendant nor the plaintiff were engaged in interstate commerce. The uncontradictory testimony in the case is that the plaintiff and the defendant were engaged in switching cars on the tracks—the main line and the side tracks—of the defendant within its yards; that the injury is alleged in the complaint to have occurred on the 15th day of March, 1911, while [320] the plaintiff and defendant were engaged in interstate commerce. At the bottom of the first page of the complaint it is alleged— (Thereupon counsel reads from the complaint at length.) Now, the position we take, if your Honor please, is that switching in yards is not interstate commerce. I read the excerpts from this complaint to show that it is based—the liability is based—upon the negligence of the defendant while engaged in interstate commerce. The Federal Employer's Liability Act provides that when a railway company is engaged in interstate commerce and any injury happens as a result of the negligence of the defendant while so engaged, it is a liability of the railway company.

Now, the theory of this complaint—every line of it—in fact, its breath runs through every utterance in this complaint—that the injury occurred and the damage was received by the plaintiff while he and the defendant were engaged in interstate commerce. If that is not true as a legal proposition from the facts as admitted and uncontradicted, then the plaintiff in this case cannot recover in this action. Very fortunately for us the Court of Appeals of the Third Circuit handed down an opinion on June 21st, 1912, on this very question as to whether trains switched in yards of the company was interstate commerce. Now, the theory as indicated possibly by the testimony of one of their witnesses, was whether this injury occurred while the cars were in transit between the initial and final point on the line of the defendant, or whether it occurred after the cars had reached their destination in the yards of the company and had been turned over to the switching crew for their operation. The Court will take judicial notice that there are two kinds of crews in all railroad service—one a train crew and the other a switching crew, [321] and our contention is whenever the switching crew get control of the cars that come from the main line of the road, and begin their operation of switching, then it ceases to be impressed with interstate carriage and becomes one under the local law. This case, if the Court please, is Erie Railway Company vs. The United States; it is reported in the advance sheets of the Federal Reporter under date September 19th, 1912, and is

reported in volume 197, at pages 287 to 292, inclusive. This was an action by the Government against the railway company for violating the safety appliance act while switching its cars in its yards over its switches and main line and around in its yards after it had been turned over—in other words, after the train crew had ceased to control or operate it, and after the switching crew had taken charge of it and were performing the operations of switching in the yards of the company. Now, the lower court held that it was interstate commerce—the district or Circuit Court as the case may be. On appeal to the Court of Appeals it was reversed on the ground that the operation of the defendant in switching in its yards—in its terminals—was not interstate commerce, and sent the case back for a new trial. That was the only case involved in this case—the single question decided by the lower court that it was interstate commerce if they were handling interstate cars. The Court of Appeals held on appeal that, although they were interstate cars, yet if they had gone into the hands of the switching crew and were being switched from point to point in its yards, it was not interstate commerce, but was governed by local law. Now, the safety appliance act is exactly like the federal employer's liability act in relation to interstate commerce, except that the safety appliance act provides that a railway company shall [322] not operate cars upon its lines unless it has the appliances provided for in the safety appliance act; but it must be engaged in in-

terstate commerce. The Federal Employer's Liability Act says that the company shall be liable or will be liable to the plaintiff in the event that an injury happens while engaged in interstate commerce. As I say, this complaint is drawn upon that theory—it is based upon that theory. The testimony of the case conclusively shows that the effort of the plaintiff in this case has been at all times to show that it was engaged in interstate commerce at the time of this accident, when it was engaged exclusively and alone in switching.

(Thereupon counsel reads portions of the decision in the case above cited.) And there is one other good reason for this: Railway companies frequently do not operate terminals at all; it is done by independent terminal companies; and the same conditions would apply to a railway as would apply to an independent company.

The COURT.—You think, assuming that you are right in that question of law, do you think that the complaint may not be sustained—I mean that this case may not be given to the jury upon the issue as to whether this defendant was a common carrier?

Mr. McFARLAND.—I don't think so. It is alleged—

The COURT.—I know, but doesn't it also imply; the very allegations with reference to its interstate commerce business imply that it was a common carrier. They may have alleged more than they needed to. But assuming that it was a common carrier and assuming that the necessary effect of the allegations

in the complaint be that the defendant was a common carrier and that the accident occurred at the time we were a territory?

Mr. McFARLAND.—That would be very true and I imagined that would come from the other side.

[323] The COURT.—It is proper to come from the Court before he instructs the jury.

Mr. McFARLAND.—Certainly.

The COURT.—This is an application to the Court to instruct the jury, and he will not do that unless advised properly.

Mr. McFARLAND.—I would have advised the Court along that line further if I had not thought that the reply would come from the other side along those lines, and the Conrt would give me an opportunity to reply to them. That would be true if the cause of action were based upon the theory that they were liable by reason of the fact that this was a territory and that the injury occurred at the time we were a territory, but you can't allege and prove a case along one theory and then apply it to another.

The COURT.—Why not? Suppose the plaintiff was absolutely in error about the law, but suppose the facts alleged entitled him to relief, does it make any difference whether he knew the law or not? Isn't the Court bound to apply the law, not according to the theory of the complaint, but according to the legal effect?

(Thereupon the question is argued further to the Court by counsel, the argument not being taken down by the reporter.)

The COURT.—I get your view point and you may be right on this subject of interstate commerce. I will have to look into that more carefully, however, before I find the rule.

Mr. McFARLAND.—The Court should bear in mind that interstate commerce gives this Court jurisdiction under the Federal Employer's Liability Act.

The COURT.—Yes, if the cause had originated after the admission of the State, but as it originates when we are a territory—

[324] Mr. McFARLAND.—But it was brought on the ground that we are engaged in interstate commerce.

The COURT.—You may be right as to that, but it seems to me the facts are sufficiently charged to indicate that the defendant was a common carrier and therefore sufficient is alleged in the complaint to sustain proof as to that fact and then to give the Court jurisdiction to grant relief.

Mr. McFARLAND.—Does your Honor claim that the mere fact that the railway company is a common carrier would give jurisdiction under the Federal Employer's Liability Act?

The COURT.—So long as we were a territory.

Mr. McFARLAND.—But independent of that fact?

The COURT.—No, it would not.

Mr. McFARLAND.—Unless it was interstate commerce.

The COURT.—That is true.

(Testimony of R. C. Bond.)

Mr. McFARLAND.—Now, if the complaint had been drawn on the theory that we were a territory and therefore the act applied independent of interstate commerce—

The COURT.—Then we get back to the proposition that we discussed before: that the plaintiff may have been ignorant of the law—which, of course, we do not assume. Under the law a common carrier must be a common carrier if engaged in interstate commerce, so the jurisdiction of the Court could rest upon either or both, assuming you are right as to the interstate commerce proposition. It rests upon either, not upon both.

Mr. McFARLAND.—The Court will have to take judicial notice then that we were a territory, though it is not alleged.

The COURT.—I think I may do that. I do not think it even has to be proven or alleged. The Court will take judicial [325] knowledge of the change of political status. The motion will be overruled.

Mr. McFARLAND.—To which we except.

[Testimony of R. C. Bond, for Defendant.]

R. C. BOND, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. State your name. A. R. C. Bond.

Q. What is your business?

A. Surveyor and draughtsman for the A. C. Company and the A. & N. M. Railway.

(Testimony of R. C. Bond.)

Q. How long have you been employed in that capacity? A. Five years.

Q. What experience have you had in field work?

A. Just with the Arizona Copper Company and the A. & N. M. Railway Company five years.

Q. How continuously have you been employed in that work?

A. Well, perhaps half the time in field work and half inside work.

Q. During that period? A. Yes, sir.

Q. Do you know the A. & N. M. Railroad—that part of its track between the bridge over the San Francisco River and the Shannon switch?

A. Yes, sir.

Q. Did you at any time make any measurements of the grade of that road? A. Yes, sir.

Q. When? A. About some time in April, 1911.

[326] Q. Do you remember the fact of an accident occurring there in which Mr. Clark was injured? A. Yes, sir.

Q. Was it before or after that?

A. It was about three weeks after that, I judge.

Q. Do you remember the fact of any block signals put in? A. I don't remember that.

Q. Was this survey made before that or after?

A.

Q. Did you make a drawing as a result of that survey? A. Yes, sir.

Q. Have you that with you?

A. Yes, sir. It is over there in the chair.

Q. Here in the building? A. Yes, sir.

(Testimony of R. C. Bond.)

Q. (Handing tracing to the witness.) You may state what this— (To the Court.) Had I better have it marked?

The COURT.—Yes.

(Thereupon the tracing in question is marked Defendant's Exhibit "A" for identification.)

(By Mr. KIBBEY.)

Q. I now show you a paper marked Defendant's Exhibit "A" for identification and ask you to state what that is. I ask generally if that is a correct map or diagram showing the grade of that part of the A. & N. M. Railroad from the bridge to the Shannon switch?

Mr. SEABURY.—To that we object on the ground that no proper foundation has been laid for its introduction, and the witness has not qualified as a competent surveyor or engineer.

The COURT.—I understood him to say that was his business.

[327] Mr. SEABURY.—All he said was that he had experience for five years with the Arizona Copper Company and the A. & N. M.

The COURT.—The objection is overruled. I think that is sufficient.

Mr. SEABURY.—We except.

(By Mr. KIBBEY.)

Q. Is that a correct map or platting of that grade?

A. It is as far as I know.

Q. Who made it?

A. I took the notes and made the drawing and profile.

(Testimony of R. C. Bond.)

Q. You made the drawing and profile?

A. Yes, sir.

Q. What is the horizontal scale of this?

A. Ten inches to the foot—ten feet to the inch, I mean.

Q. How about the vertical?

A. That is the same.

Q. The vertical and horizontal are the same?

A. Yes, sir.

Mr. KIBBEY.—I would like to exhibit this to the jury with an explanation of the different marks there may be on it.

Mr. SEABURY.—Has it been received in evidence?

Mr. KIBBEY.—I will offer it.

Mr. SEABURY.—I object to the map as not sufficiently proved and there being no evidence before the Court to determine as to what time this purports to disclose the condition.

Mr. KIBBEY.—About three weeks after the accident.

Mr. SEABURY.—We object that it shows the condition after the accident and is not competent to prove the condition at the time of the accident.

The COURT.—I overrule the objection.

[328] Mr. SEABURY.—We except.

Mr. KIBBEY.—It may be exhibited then?

The COURT.—After it has been marked.

(Thereupon the map in question is received in evidence and marked by the clerk, Defendant's Exhibit "A.")

(Testimony of R. C. Bond.)

(By Mr. KIBBEY.)

Q. Now, Mr. Bond, please state what is this at the end of the map. (Indicating a mark on the map and at the same time exhibiting it to the jury.)

A. All readings were taken from the Shannon switch point to the first caisson of the San Francisco river bridge.

Q. What do you mean by "caisson"?

A. Supports.

Q. What is the measurements taken from—Shannon switch? A. Yes, sir.

Q. Shannon switch is indicated by appropriate words or letters on the map?

A. Yes, sir—"Shannon switch point."

Q. What is the distance from Shannon switch to the first caisson of the bridge?

A. Eight hundred and forty-six and six-tenths feet.

Q. What is the alignment of the track—straight or on a curve?

A. It is straight for about six hundred feet, I should judge, and then there is a curve.

Q. Where is the curve?

A. At the bridge. It begins about six hundred feet from the switch.

Q. About how much of that is straight track from the bridge to Shannon switch?

[329] A. About six hundred feet.

Q. Now, then, will you indicate the grade of that track beginning at the Shannon switch clear to the bridge at intervals of twenty-five feet? Have you

(Testimony of R. C. Bond.)

noted it on here? A. Yes, sir.

Q. Now, will you state that, both in percentages and also in the actual amount of grade, either up or down, from point to point?

A. It is .2% down for the first 25 feet, or a difference of 5/8 inch. The next is .1% down for 75 ft. or a difference of 7/8 inch in 75 feet.

Q. You are now going toward the bridge?

A. Yes, sir. The next is .28% down for 25 feet or a difference of 5/8 inch; the next is .1% down for fifty feet or a difference of 7/8 inch in fifty feet; the next is .1% up for 25 ft. or 5/16 inch difference; the next is .1% down for 25 ft. or 5/16 inch; the next is .1% up or 5/16 inch difference; the next is .1% down or 5/16 inch difference; the next of .48% up or 1 7/16 inches difference; the next is .1% up for one hundred feet or 1 3/16 difference; the next is .1% down for twenty-five feet or 5/16 inch difference; the next is .1% up for 25 ft. or 5/16 inch difference; the next is .48% up for 25 ft. or 1 7/16 inches difference; the next is .1% up for 50 ft. or 5/8 inch difference.

A JUROR.—What is this here in regard to that crossing?

The WITNESS.—That shows the crossing to be about five hundred and fifty feet from the switch point. The next is .28% up for 25 ft. or 7/8 inch difference; the next one is level for 25 ft.; the next is .4% up or 1 3/16 difference for 25 ft.; the next is .68% up for 25 ft. or 2 1/10 inches difference; [330] the next is .1% up or 5/8 inch difference for fifty feet; the next is .2% down or 5/8 inch difference for

(Testimony of R. C. Bond.)
twenty-five feet; the next is .4% down or 1 3/16 inches in twenty-five feet; the next is .24% down or 3/4 inch; the next is .2% or 5/8 inch; the next twenty-five feet is level, and the next is .1% up for twenty-five feet or 5/16 inch difference, and the last twenty-five feet is level.

Q. What is the average grade?

A. I don't know what the average grade is.

Q. Can you figure it?

A. Surely. (Witness figures.) It would be about five one hundredths per cent. That is not absolutely correct.

Q. That would be how much in the entire distance —how much difference in elevation?

A. The total distance about four and one quarter inches, or thirty-five one hundredths of a foot.

Q. Which is the higher point?

A. The bridge end.

Q. How far would you have to go from the bridge until you assumed that average going toward the Shannon switch?

A. You wouldn't have to go very far before you got to it.

A JUROR.—Whereabouts is the crossing?

The WITNESS.—About in here. (Indicating.) Five hundred and fifty or seventy-five feet from the San Francisco river.

The JUROR.—At the far end is where it crosses the river?

The WITNESS.—Yes, at the bridge end.

(Testimony of R. C. Bond.)

(By Mr. KIBBEY.)

Q. In inches, how much would you say the difference was? A. About four and a quarter inches.

Q. In elevation between the two points?

[331] A. Yes, sir.

Q. In how many feet?

A. Eight hundred and forty-six and six-tenths feet.

Q. What is the gauge of that road?

A. Four feet, eight and a half inches—standard gauge.

Q. What is the character of the steel they have on it?

A. They have about seventy-five pound rails.

Q. Do you know where the yard is in Hill's flat?

A. Yes, sir.

Q. Which way from the river is it?

A. South of the river.

Q. In that direction from the river? (Indicating on map.) A. Yes, sir.

Q. Do you know where the town yards are?

A. Yes, sir.

Q. Which way from the Shannon switch?

A. North.

Q. Now, have you another map, Mr. Bond, showing the plan of the main track and of the switch?

A. Yes, sir.

Q. Will you produce that?

(At this point a juror begins to question the witness concerning the map.)

The COURT.—It is improper for the jury to in-

(Testimony of R. C. Bond.)

terrogate the witness unless you get it into the record.

The JUROR.—I wish to know which way the Shannon switch runs—here or here? (Indicating.)

The WITNESS.—It runs back this way—south.

(By Mr. KIBBEY.)

Q. What have you there?

[332] A. A plan of the tracks in the vicinity of the Shannon switch.

Q. Who made that plat?

A. I plotted the notes—took part of them.

Q. Have you made any measurements or are you sufficiently advised as to the map to know whether it is a correct map or not? A. I think it is.

Mr. KIBBEY.—We would like to introduce it in evidence.

Mr. SEABURY.—We make the same objection to it as to the other map.

The COURT.—I overrule the objection.

Mr. SEABURY.—We would like to examine it further before concluding our objections to it.

(Thereupon counsel examines the map.)

Mr. SEABURY.—We have no further objections to urge to it.

The COURT.—It may be received.

(Therefore the map in question is received in evidence and marked by the clerk, Defendants' Exhibit "B.")

(By Mr. KIBBEY.)

Q. Now, will you indicate on that map, Mr. Bond, the Shannon switch?

(Testimony of R. C. Bond.)

A. Yes, sir. The Shannon switch is located right here—the switch point. (Indicating on map.)

Q. Now, take from there, the direction from left or right of the map is the bridge?

A. It is in a southerly direction.

Q. Toward the bridge? A. Yes, sir.

Q. There are three lines there. Which of these, will you [333] please tell the jury, would this represent? (Indicating.)

A. That would indicate the standard and narrow gauge tracks.

Q. Three rails to the track?

A. Yes, sir, three rails.

Q. What is this leading off here where there are only two lines?

A. That is the narrow gauge track off to the side.

Q. This is the Shannon switch? A. Yes, sir.

Q. How far is it from the Shannon switch—that is, the switch point—to the frog?

A. Seventy-four feet.

Q. Will you indicate there where the frog is?

A. It is marked there—"frog point."

Q. Do you know what the angle of departure is?

A. Yes, sir, it is a number nine frog, six degrees and twenty-two minutes angle.

A. Do you know the width of that engine-cab? First, do you know the engine used in switching, known as yard engine? A. Yes, sir.

Q. Do you know the width of that cab?

A. I think ten feet six inches.

Q. Do you know the width of those box-cars?

(Testimony of R. C. Bond.)

A. About nine feet six inches.

Q. Can you state at what point the cab of that engine and the corner of that car would come in collision south of the frog?

Mr. KEARNEY.—We object to the question unless the witness further qualifies by knowing the point.

[334] Mr. KIBBEY.—It is a mathematical matter and he is an engineer.

The COURT.—Is it a matter of computation?

Mr. KIBBEY.—Yes, sir.

The COURT.—The exact place?

Mr. KIBBEY.—Yes, sir, it couldn't meet any place else. It is simply a question of the overhang of the two.

Mr. SEABURY.—The witness has been asked the general question at what point between those tracks the cars would come together.

The COURT.—Do you desire to put a hypothetical question?

Mr. KIBBEY.—No. I have asked him what the angle was; I have asked him what the width of the track and the width of the cars and the width of the engine-cab. Your Honor can just as easily calculate it as I can, but I presume we both would like to have the assistance of someone accustomed to making computations of that kind.

Mr. SEABURY.—We object to it for the reason that no proper foundation has been laid for the introduction of this evidence by this witness.

The COURT.—What do you mean by that?

(Testimony of R. C. Bond.)

Mr. SEABURY.—There is nothing to show the dimensions of the cars to which counsel has reference. The question is general in its character—at what point will cars come together? That must necessarily depend on the width of the two cars that collide. If one car is smaller it would not collide with the larger at the same points that two large cars would collide—that is obvious.

The COURT.—The question assumes the width of both cars, does it not?

[335] Mr. SEABURY.—Yes, but I have proved it.

(By Mr. KIBBEY.)

Q. What is the width of the cab of that engine?

A. About ten feet six.

Q. What is the width of those cars?

A. Nine feet six.

Mr. SEABURY.—Which cars?

(By Mr. KIBBEY.)

Q. Do you know the cars in that collision?

A. I do not—I haven't seen them.

Q. Very well. Suppose they are nine feet six inches, where is the point that they would come in collision?

Mr. SEABURY.—We object to the question as assuming a state of facts not proven.

The COURT.—There has been proof of the width of the car.

Mr. SEABURY.—Of both of the cars.

The COURT.—I think so.

Mr. KIBBEY.—I don't recollect that.

(Testimony of R. C. Bond.)

The COURT.—I am not sure as to the car next to the tender.

Mr. KIBBEY.—There was a general statement as to the car being a stock or box-car.

The COURT.—Some witness testified as to the width of that car—I think it was Mr. Clark.

Mr. McFARLAND.—He said the tender and cars were exactly the same width.

Mr. KIBBEY.—Was there any testimony as to the width of the other car?

The COURT.—That I do not recall.

Mr. SEABURY.—I think the question is objectionable.

Mr. McFARLAND.—We will follow it with the proof that the cars [336] are alike. It is a matter of computation.

The COURT.—You withdraw the question for the present?

Mr. KIBBEY.—Oh, yes.

(To the witness.)

Q. Where is the point of curve, Mr. Bond, from that switch—how far from the switch?

A. Just about at the switch, as near as I can figure it out.

Q. The switch point is distinguished from the frog? A. Yes, sir.

Q. Thence curves in which direction—right or left? A. It curves to the left.

Q. What degree?

A. About a fifteen degree curve.

Q. How far does it maintain that curve?

(Testimony of R. C. Bond.)

A. For about three hundred feet, I should judge—I didn't measure the full length of it.

Mr. KIBBEY.—That is all.

Mr. SEABURY.—I don't think we wish to make any cross-examination of Mr. Bond.

(Witness excused.)

Mr. SEABURY.—I move to strike out the evidence of Mr. Bond on the ground that it is irrelevant and immaterial and not properly connected.

The COURT.—I deny the motion.

Mr. SEABURY.—We except to the ruling of the Court.

[Testimony of J. M. Kline, for Defendant.]

J. M. KLINE, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

[337] Q. What is your name? A. J. M. Kline.

Q. Where do you live? A. At Clifton, Arizona.

Q. What is your business?

A. Engine foreman—switchman.

Q. In whose employ? A. A. & N. M. Railway.

Q. How long have you been employed by that railway company in that capacity?

A. Six years the seventh day of this month.

Q. In what part of the service have you been employed covering that period?

A. Usually most of the time as engine foreman and extra conductor on the road.

Q. What would your duties as engine foreman be?

(Testimony of J. M. Kline.)

A. Well, I have full charge of the engine and over the switchmen.

Q. Is that on the main line of the road or in the yards? A. In the yards.

Q. Then, when I understand you to say you were engine foreman, you mean you were foreman of the engines in the yards of the company? A. Yes, sir.

Q. And those duties didn't extend outside of the yards? A. No, sir.

Q. What comprised the yards of the defendant at Clifton? How far do those yards extend? What are their boundaries or limits?

A. Seven miles out from town is the end of the yard limits.

[338] Q. In which direction?

A. South. And then they go a mile north. And then they extend a half mile or three quarters of a mile kind of southwest—that is, to Shannon.

Q. Is the Shannon smelter within the yard limits?

A. Yes, sir.

Q. Where is Hill's flat in reference to Clifton proper?

A. It is south—just across the San Francisco river.

Q. Where is it from the bridge across the San Francisco river?

A. Well, it starts right in at the south end of the bridge.

Q. Would that be the south or east end?

A. The east, or southeast.

Q. How far does that run from what is known as

(Testimony of J. M. Kline.)

Hill's flat—about?

A. Why, it runs about a third of a mile, I presume.

Q. About a third of a mile. Where were the cars—where did you find the cars that were switched up on to the main line and up on the Shannon switch on the 15th? A. We got them at Hill's flat.

Q. When were they placed there, if you know?

A. The 14th of March, 1911.

Q. Then did they remain there until the morning of the 15th?

A. Yes, sir; about nine fifteen the morning of the 15th.

Q. Did they come there in a train?

A. They did.

Q. Composed of those cars?

Mr. SEABURY.—Every question so far has been leading, and I object to this particular one as leading.

The COURT.—It is leading in form.

[339] (By Mr. McFARLAND.)

Q. How are those cars that you pulled up there on the morning of the 15th in front of the Shannon store brought on to the Hill's flat, do you know?

A. Brought there by a road engine and road crew commonly known as the train crew.

Q. Left there by them? A. Yes, sir.

Q. Is that in the yards?

A. That is as near as I can remember.

Q. That is in the yards of the company?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. Were there any other cars brought in on that train except the twelve? A. There was.

Q. What was done with those?

A. Switched around to different places in the yard.

Q. On the 14th or 15th?

A. On the morning of the 15th. They had to be switched in order to get these Shannon loads out.

Q. They were in the train that brought in the—they were brought in with the cars that composed that train? A. Yes, sir.

Q. What time was it when you went down to the flat to get those cars?

A. As near as I can remember, about nine o'clock.

Q. Were those cars all together when you went down there?

A. No; we had to make a couple of switches, if I remember.

Q. In order to get those twelve cars?

A. Yes, sir.

[340] Q. After you did that switching and got those twelve cars, what did you do then?

A. We pulled up and left eight on the south side of the crossing—what is known as Shannon crossing—and took four up the Shannon hill.

Q. What did you take them up with?

A. A locomotive.

Q. What was that locomotive engaged in—what were you doing with that locomotive?

A. Switching.

Q. What was the crew that attended that engine

(Testimony of J. M. Kline.)

and those cars? A. I beg pardon?

Q. I say, what was the crew—was it the switching crew or the crew on the main line?

A. It was the switching crew.

Q. Now, you left those cars standing, you say, south of the road— A. Eight of them.

Q. Did you detach four cars from the twelve?

A. We held on to four cars; yes, sir.

Q. And took those four cars up the main line?

A. Yes, sir.

Q. Did you go with them? A. I did.

Q. Did you cut them off? A. I did.

Q. And went up the main line? A. Yes, sir.

Q. Beyond the Shannon switch?

[341] A. Pulled up over Shannon switch.

Q. Then what did you do?

A. Went to Shannon—backed up Shannon.

Q. And delivered them to the Shannon smelter?

A. We didn't deliver them, we just stored them in the Shannon yard up there.

Q. Then what did you do?

A. Came on back. We kicked these cars in at the top of the hill and left switchman Murphy there with them.

Q. Was he one of the switching crew?

A. Yes, sir.

Q. That was the four cars you first took up?

A. Yes, sir; the first four cars.

Q. And you left one switchman up there with them? A. We did.

Q. Who came down with you?

(Testimony of J. M. Kline.)

A. I came down with the engine.

Q. Who else? A. St. Thomas.

Q. And the engineer and fireman?

A. The engineer and fireman, of course.

Q. Did you go back to those eight remaining cars?

A. Yes, sir.

Q. What did you do with them?

A. Pulled them up and left four just to clear the Shannon track.

Q. And the other four?

A. We held on to the other four—uncoupled them and pulled ahead over the Shannon switch.

Q. Who uncoupled? [342] A. I did.

Q. I asked you before that—did you find the eight cars at the same point you left them when you returned? A. Yes, sir.

Q. Hadn't moved at all? A. No, sir.

Q. Were the brakes set? A. No, sir.

Q. Then you personally cut the four cars off from the eight? A. I did.

Q. Were the cars stopped at that time?

A. Yes, sir.

Q. Perfectly still? A. Yes, sir.

Q. How did you cut those cars off?

A. Pulled the pin on them—also broke the air hose.

Q. Was there any air on the freight-cars?

A. No, sir; just the hose was coupled is all.

Q. You pulled the pin and gave the engineer a sign to move on? A. Yes, sir.

Q. Now, how far did you take those cars up the

(Testimony of J. M. Kline.)

main track before you began to back up to the Shannon switch?

A. I couldn't tell the exact distance, but about a car-length or a car and a half.

Q. Who gave the engineer the signal to back up?

A. I gave it to St. Thomas and St. Thomas passed it to the engineer.

Q. Where were you?

A. I was throwing Shannon switch.

Q. Crossing the main line to the switch?

[343] A. I didn't have to cross the main line at all.

Q. You were on that side? A. Yes, sir.

Q. Were you on the four cars at any time that were cut off and carried up—were you on them at any time after you cut them off from the four cars that remained?

A. Was I on the four cars that I left on the main?

Q. No; were you on the four cars that were cut off from those left on the main line?

A. That the engine had hold of?

Q. Yes.

A. Yes, sir; I was on the end—swung on under the end.

Q. How far did you swing on there?

A. Just took hold of the handhold and swung under the edge and rode with my feet caught onto the oil-box.

Q. How far did you ride that way?

A. Three or four car-lengths.

Q. Then you got off? A. I got off at the switch.

(Testimony of J. M. Kline.)

Q. Then where did you go?

A. Threw the switch and jumped across on the other side and caught the cars as they were coming back.

Q. That is, the four cars backing up?

A. The four cars that was pushed by the engine backwards. Yes, sir.

Q. Did you get up on the cars then?

A. I did—climbed up on the cars then.

Q. Which end?

A. The south end and on the west side.

Q. That would be the furtherest car from the engine?

[344] A. Yes, sir; the head car going up the hill.

Q. Were there any other brakemen on the cars?

A. St. Thomas was on the east side on the car next to the engine sitting down.

Q. And you caught the furtherest car from the engine?

A. I was on the south car on the west side.

Q. What was your position on that car?

A. Just as I have stated.

Q. Sitting down or standing up?

A. Had one leg throwed over the end of the car, and the other leg was on the top round before you get to the top of the car—the top handhold.

Q. Was your back to the engineer? A. It was.

Q. Facing south? A. Yes, sir; facing south.

Q. Toward the Shannon switch? A. Yes, sir.

Q. About that time, was your attention called to those cars on the main line, the four cars you left

(Testimony of J. M. Kline.)

remaining? A. I don't understand.

Q. Did you see the cars you left on the main line as you were backing up the Shannon switch?

A. I saw those cars most of the time, only when I was jumping across the main line to catch the cars coming back is about the only time my attention was attracted any other way.

Q. Was there anything particular that attracted your attention to the four cars on the main line?

A. Just as I got to the top of this car—I should say we were about a car or a car-length and a half south of the switch [345] going up Shannon hill, I noticed these cars creeping, and I gave a couple of washout signals and jumped up on top.

Q. To whom did you give the washout signals?

A. To anyone that was there that could see me. I knew that St. Thomas or the fireman would see me—that is, if they were both in their place.

Q. The fireman was in his place? A. Yes, sir.

Q. And St. Thomas was on the next car to the tender?

A. Yes, sir; but he didn't see my signal, so he says.

Q. Did the fireman see it?

A. The fireman did; yes, sir.

Q. Now, what do you mean by a washout signal?

A. I mean if you signal in any shape or form to get them to stop right now, such as this (indicating by waiving hand up and down) with both hands or your hat or glove, or anything like that.

Q. That means stop immediately?

(Testimony of J. M. Kline.)

A. It means do everything possible to stop.

Q. Where were you when you gave that signal?

A. On the end of the car going south.

Q. How far from the switch?

A. About a car and a half south of the switch.

Q. Is there anything in that washout signal that means immediate danger?

A. Yes, sir; that is what is commonly used—danger—man on the track or a cow on the track. That is the only way we have of telegraphing it to the engineer.

Q. I understand you were about a car and a half—that your position at that time was about a car and a half or a car-length south of the switch.

[346] A. Yes, sir.

Q. Where would that place the engine in which Mr. Clark was in charge of?

A. That would place the engine about two cars and a half and the length of the tender north of the switch.

Q. Approximately what distance would that be?

A. Well, it is owing to what length of cars—you mean the cars we had?

Q. Yes.

A. Average about forty feet to the car—that would make it about a hundred and twenty feet, I should judge.

Q. And his engine at the time you gave the washout signal was one hundred and ten feet north of the switch? A. Yes, sir.

Q. Now, what is the distance between the switch

(Testimony of J. M. Kline.)

and the frog? A. Seventy-four feet.

Q. What is the distance between the frog and the point of accident, if you know?

A. Forty-one feet.

Q. South? A. South of the frog.

Q. Then, can you tell us the distance in feet from the point of accident to the point where Mr. Clark's engine was when you gave the washout signal?

A. About a hundred and thirty-five—I mean two hundred and thirty-five feet.

Q. Two hundred and thirty-five feet?

A. Yes, sir.

Q. Would his engine have to go two hundred and thirty-five feet from the point where you gave the signal before it would collide [347] with the cars?

A. That is, where the cars stopped at, yes, sir.

Q. You know where they stopped? A. I do.

Q. You say that is two hundred and twenty-five feet from the place where Mr. Clark's engine was when you gave the signal? A. Yes, sir.

Q. Have you ever had any experience in operating cars? A. I have.

Q. And the distance at which trains could be stopped? A. No, sir, I never made any tests.

Q. Well, you have operated—seen that operation, haven't you? A. Never saw it tested, no, sir.

Q. Did you ever see a train stop?

A. I have, many a one.

Q. Did you ever see a train stop by the application of brakes? A. Hand-brakes or air-brakes?

Q. Air. A. Yes, sir.

(Testimony of J. M. Kline.)

Q. From your knowledge and experience in that line, at what distance would you say an engine and four cars going at the rate of six miles an hour could be stopped by the application of direct air?

Mr. SEABURY.—We object to the question for the reason that there has been no proper foundation laid for the introduction of this evidence, and that the facts of this case have not been properly presented in order that he might give such testimony. The result of the answer would necessarily be dependent upon a variety of circumstances not presented to the witness—such as the weight of the cars, for instance.

[348] The COURT.—Were not similar questions put to witnesses of the plaintiff?

Mr. KEARNEY.—They were on cross-examination.

Mr. McFARLAND.—He said he couldn't stop them inside of five car-lengths.

Mr. SEABURY.—The plaintiff was the engineer and familiar with the distance in which he could stop that particular train in that distance, while this witness says he is not familiar with the tests and doesn't know.

The COURT.—Do you think you are able to answer that question intelligently?

The WITNESS.—Well, I don't know. I have had about twelve years' experience railroading, during half of which time I was a locomotive fireman.

The COURT.—Before he expresses an opinion, he

(Testimony of J. M. Kline.)

must be able to state whether he can answer the question.

Mr. McFARLAND.—I will ask him a preliminary question.

(To the witness.)

Q. During that twelve years' experience you say you were part of the time fireman? A. Yes, sir.

Q. Have you ever seen cars stopped by the application of air?

A. I have—I have stopped them myself.

Q. And know the distance, about, that an engine and four cars could be stopped, going at the rate of approximately six miles an hour?

A. That depends on what kind of brakes you have on your engine.

Q. An engine equipped with air-brakes.

A. Well, there are different classes of air, some of it is bad and some good.

[349] Q. Suppose it is a good engine and well equipped.

A. I would say a man could stop four loads in three car-lengths going six miles an hour.

Q. With that particular engine that was being operated at that time? A. Yes, sir.

Q. Do you know that engine?

A. I am very familiar with it; yes, sir.

Q. Have you ever fired on it?

A. No, sir, I have fired it, but not under pay.

Q. What distance would three car-lengths be of the cars that they were hauling at that time?

A. One hundred and twenty feet.

(Testimony of J. M. Kline.)

Q. One hundred and twenty feet? A. Yes, sir.

Q. Then I understand you to say that if he had applied the air directly at the time he got your signal, he could stop that train and engine in one hundred and twenty feet?

Mr. SEABURY.—We object to the question.

The COURT.—Yes, you are simply asking him as to his opinion—not as to the fact—but his opinion as to what could be done—but not as to whether this particular engine in this particular instance.

(By Mr. McFARLAND.)

Q. What is your opinion as to the distance that engine and those cars could have been stopped by the direct application of straight air going at the rate of six miles an hour?

A. I don't believe I understand your question. Do you mean, what is my opinion regarding that engine stopping four loads going six miles an hour?

[350] Q. Yes.

A. At one hundred and twenty feet, as I said before—three car-lengths.

Q. And I understand you to say it was two hundred and thirty-five feet from the time you gave the signal to the point of collision? A. Yes, sir.

Q. What do I understand you to say your position was in reference to the frog when you gave the wash-out signal?

A. I don't believe I testified to my position regarding the frog.

Q. Your testimony was regarding the switch?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. How far would that point be from the frog?

A. About fourteen feet.

Q. About fourteen feet? A. Yes, sir.

Q. Well, you would be between the frog and the switch, wouldn't you?

Mr. SEABURY.—We object to the question—we think that is obvious.

(By Mr. McFARLAND.)

Q. Which direction was that fourteen feet from the frog? A. North of the frog.

Q. I mean from the switch.

A. South of the switch.

Q. How far from the switch and in what direction?

A. Sixty feet from the switch and fourteen feet from the frog.

Q. Now, when you gave that washout signal, assuming that [351] the cars were going at the rate of six miles an hour, did you notice any perceptible reduction of speed of that train from the time the signal was given until the collision?

A. No, sir, I didn't take time, I jumped and hollered at my partner, St. Thomas. I thought at first the cars were going to side-swipe each other, which if they had they would have taken both his legs off as he was gazing around the country some place and never seen these cars nor my signal, and I hollered at him three or four times and attracted his attention.

Q. Do I understand you to say there was or was not any perceptible reduction of the speed of the

(Testimony of J. M. Kline.)
train from the time you gave the signal until the collision?

A. I don't recollect any to my knowledge.

Q. Was the steam escaping at that time—the exhaust—was the exhaust working when you hit?

A. Yes, sir.

Q. It was puffing just as it was before?

A. Yes, sir.

Q. Then the steam wasn't shut off?

A. No, sir, she went by a car and a half after they struck.

Q. Would you say it was going at about the same speed when they collided as it was before?

A. Oh, no.

Q. Did you undertake to set any brakes when you gave that washout signal? A. I did.

Q. You set brakes? A. I did.

Q. Did St. Thomas?

[352] A. He got to setting brakes just about the time they stopped, and we tried to hold them from running back down again.

Q. But after the collision the engine passed on south—on by the cars? A. Yes, sir.

Q. How far did it go?

A. About a car-length and a half.

Q. Then did it move back? A. Yes, sir.

Q. And there was another collision as it went back?

A. Yes, sir.

Q. Do you know Mr. Clark? A. I do.

Q. How long have you known him?

A. Well, as near as I can remember, about fifteen

(Testimony of J. M. Kline.)

or sixteen years.

Q. How much of the time during the five years that you have been in the employ of the company have you been engaged in switching down at that point?

A. Well, I don't know the exact time, but I should judge about five years out of the six. I was on the road the rest of the time.

Q. During that five years how many times and how many cars have you known to roll on that track?

A. They crept on me there once before.

Q. Once?

A. Yes, sir, but they stopped of their own accord.

Q. That instance and the one in which the collision occurred are the only times you have ever known them to move? [353] A. Yes, sir.

Q. Had the method of switching and leaving the cars on the main line there always been the same so far as you know? A. Yes, sir.

Q. Left standing on the main line? A. Yes, sir.

Q. Without any brakes and without being chocked or blocked? A. Yes, sir.

Q. And only two instances in five years that you knew of, those cars rolled?

A. That is the only times to my knowledge, yes, sir.

Q. And the other instance one car rolled a few feet and stopped?

A. I didn't say one car. I said some cars crept until the slack all run out of the knuckles and then they stopped of their own accord.

(Testimony of J. M. Kline.)

Q. The same place those cars were standing?

A. No, sir, a little further back.

Q. Are you sufficiently versed in the operation of cars at a place like this one comprising eight hundred and forty-six yards from the bridge to the Shannon switch to say whether cars operated in that way would be a reasonably safe operation?

Mr. SEABURY.—We object to the question—the witness is not qualified to express an opinion on that matter—a matter that is susceptible of proof. It is a conclusion of the witness and one that the jury is only justified in assuming from the facts and not from the witness' opinion as to what is careful and what is not.

The COURT.—Yes; it is asking him in effect to decide the issue here. I sustain the objection.

[354] By Mr. McFARLAND.—To which ruling we except.

(To the witness.)

Q. You say you have known Thomas Clark how long? A. About fifteen or sixteen years.

Q. At Clifton?

A. No, I knew him in the Indian Territory.

Q. How long have you known him in Clifton?

A. A little over twelve years.

Q. Do you know his general reputation as to being a safe and conservative engineer or as to his reputation of being a reckless engineer in the operation of his engine?

Mr. SEABURY.—We object—it is clearly incompetent and inadmissible.

(Testimony of J. M. Kline.)

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know whether his methods and mode of operating his engine is of a safe and conservative character—I withdraw that—whether his mode of operating his engine in the yards of this company in switching cars is careful, or whether his method and mode of operating his engine in switching cars in the yards of the company is reckless and careless?

Mr. SEABURY.—We make the same objection, and we further object to the repeated offer of evidence which counsel must know to be incompetent, *sole* for the purpose of putting such inferences into the jury's mind—that constitutes reversible error.

Mr. KIBBEY.—We think that that statement is entirely uncalled for—we think this is competent evidence.

Mr. SEABURY.—We can't conceive of that being competent evidence.

[355] The COURT.—Upon what theory do you think it is competent?

Mr. McFARLAND.—On his method and mode of operating his engine—he said he was careful.

The COURT.—Careful in that particular instance?

Mr. McFARLAND.—Generally.

The COURT.—I don't recollect that he was asked as to that.

Mr. McFARLAND.—That goes to the question as to whether he was a careful, painstaking operator

(Testimony of J. M. Kline.)
with his engine, or whether he was a careless and reckless man.

The COURT.—Suppose he was careless and reckless—you seek to establish something from which it may be inferred that he was careless and reckless in this particular instance?

Mr. McFARLAND.—Yes, sir; a fact from which the jury may infer whether this was careless and reckless or not.

Mr. BENNETT.—It seems to me the evidence is admissible in this view of the matter; Mr. Clark testified, as also did Mr. Chambers, the fireman, that immediately on receiving the washout signal he shut off the steam and applied the air. The witness now on the stand testified that it was impossible for him to testify that that was true, but he did testify that the exhaust was working when the engine reached the place of collision, which, if true, contradicts the statement of Mr. Clark that he shut off the steam. Now, in order, then, that the jury may determine which of these facts are true, the usual, habitual conduct of Mr. Clark in the operation of his engine or his usual and habitual manner of operating his engine in such yards would be illustrative and would enable the jury to determine which would be the most likely to be true.

The COURT.—Possibly if this witness knows of instances of carelessness that might go to the jury, but I doubt whether his opinion **[356]** as to whether he is a safe operator is competent evidence. I don't know of any instance where one workman was

(Testimony of J. M. Kline.)

permitted to state his opinion as to whether the other fellow was a safe workman or not, or whether he had that reputation or not, unless that be the issue, as, for instance, whether the employer was negligent in hiring him or suffering him to work so as to injure the lives of other workmen; but as establishing whether in a particular instance a workman is careless or otherwise, I know of no instance where proof of general reputation of that is admissible.

Mr. BENNETT.—Possibly not general reputation, but I understand he worked with Mr. Clark in the same switching crew and that he did know of his usual and general conduct in reference to switching and handling his engine.

The COURT.—I should think as far as the matter could go in that way would be to admit proof of instances of like omissions to take the ordinary methods of caution, but not his impression—not his opinion—as to that matter.

By Mr. McFARLAND.—Note our exception.

(To the witness.)

Q. Do you know of Mr. Clark's habits—I withdraw that. Do you know whether as a general rule Mr. Clark obeyed signals or whether he ignored signals?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I think the objection is equally good to that question.

Mr. McFARLAND.—We except.

(To the witness.)

(Testimony of J. M. Kline.)

Q. Do you know of instances where Mr. Clark disobeyed signals?

[357] Mr. SEABURY.—We object to that question also. The issue here is not whether Mr. Clark was careless about obeying signals.

The COURT.—Suppose the evidence be conflicting on that point? Suppose, assuming that the evidence indicates—the evidence put in by the defendant here indicates—that he didn't respond promptly to the signal to stop or didn't cut off the steam. Now, there is an issue of fact. Would it not, under the circumstances, be competent to show that in other instances the defendant was likewise slow to respond to the signal, or careless?

Mr. SEABURY.—We think not. Assume for the sake of argument that he was careless—careless on other occasions—yet on the occasion of the injury he might have been proceeding with care.

The COURT.—Would it lend anything to the probability of the case?

Mr. SEABURY.—We think not, and contend it is absolutely incompetent to receive such evidence, even assuming that they have it to produce, which we do not concede.

The COURT.—The individual element—the human element—is a factor in all these matters—some men are slow or quick to respond to signals of danger. Now, how is the jury to determine which of these contributing theories of fact is the true one unless they have all the light that can be thrown on that including the individual factor?

(Testimony of J. M. Kline.)

Mr. SEABURY.—We want them to have all the light that can be thrown upon the issue here. We say all that light comes from the evidence of these witnesses as to what took place on this occasion, and that can be the only test.

The COURT.—But suppose those witnesses are sharply conflicting?

Mr. SEABURY.—Then it is for the jury to determine.

The COURT.—Then may they not consider which the more probable theory?

[358] Mr. SEABURY.—That may be true, but we say they may not consider which is more probable if it is based on evidence which is not competent be*cause does* not relate to the matter involved.

The COURT.—But Mr. Clark was there—he was the actor in the matter. Suppose his hearing or sight was bad and sharp hearing or sight had something to do with his conduct, would it not be admissible to show his defective hearing or acuteness of *sight* or defective sight or acuteness of sight as the case may be?

Mr. SEABURY.—We think not, and we say further in answer to that that if he had any defective sight or hearing it was the duty of the defendant to discover it.

Mr. KIBBEY.—He can't complain of that.

The COURT.—This evidence is only admissible on the theory that it shows contributory negligence.

(Thereupon the question is argued further to the Court, the further argument not being taken down by the reporter.)

(Testimony of J. M. Kline.)

Mr. SEABURY.—There is another ground of objection. Any question however framed, calling for other acts, practically asks the witness to state whether he exercised care on those occasions or not—the question is pratically did he exercise care on other occasions.

The COURT.—I am in doubt about it. The objection will be sustained. I think it is safer.

Mr. McFARLAND.—We except. Now, I desire to put the question a little more definitely so as to get it into the record in better shape.

The COURT.—You may do so.

(By Mr. McFARLAND.)

Q. Do you know of any instances on other occasions previous [359] to this accident where Mr. Clark failed or refused to obey signals given him?

Mr. SEABURY.—We make the same objection.

The COURT.—The objection is sustained.

Mr. KIBBEY.—May we, in order to preserve our exception, state what we desire to prove?

The COURT.—I think it is already apparent. The argument has developed that.

Mr. McFARLAND.—If there is any doubt about it we would like to state it.

Mr. SEABURY.—We object to the statement of what they desire to prove, and ask that counsel put their question to the witness. I shall object to any offer made for the purpose of a bill of exceptions.

The COURT.—I think this conference is absolutely unnecessary. I think if a bill of exceptions is necessary to be prepared in this case the Court can

(Testimony of J. M. Kline.)

find upon the record here enough without stating—repeating the statements—to put into the bill of exceptions to indicate the purpose of the offer. That is all you desire.

Mr. McFARLAND.—In one case decided by the Supreme Court, the Court refused to consider the matter for the reason that the offer was not made. That is in the case of the Territory vs. Creardon.

The COURT.—You mean it was not stated that the witness would answer the question.

Mr. McFARLAND.—They didn't state what they offered to prove by that witness, and therefore the Court wouldn't consider it. It might be that the Supreme Court of the United States might be governed by decisions of the local court on these questions.

[360] The COURT.—Of course the Court couldn't say by bill of exceptions that the witness would testify—

Mr. KIBBEY.—No, but that we offered to prove by the witness, so and so.

The COURT.—Now you may proceed.

(By Mr. McFARLAND.)

Q. Has not Mr. Clark, during your knowledge of him while he was operating the switch engine in the yards of the defendant company, uniformly refused and declined to obey signals given him?

Mr. SEABURY.—We object to the question on the ground already urged and further that it has been asked and answered repeatedly.

The COURT.—I sustain the objection.

(Testimony of J. M. Kline.)

(By Mr. McFARLAND.)

Q. Are there not numberless instances that you know of personally where he has refused or neglected to obey signals given him while operating the switch engine in the yards of the defendant at Clifton?

Mr. SEABURY.—We make the same objection.

The COURT.—I sustain the objection.

Mr. SEABURY.—And I ask your Honor to instruct the jury at this time that they must disregard these questions asked by counsel, and that they must not assume that the answer would be favorable to the defendant if allowed to be answered.

The COURT.—That is true, and I assume the jury will understand that fact, that nothing implied in a question that is ruled out to be improper is to be considered by the jury as any sort of evidence. Now, then, you may proceed.

(By Mr. McFARLAND.)

Q. You say you have had quite a lot of experience in operating [361] trains and in switching cars?

A. I have.

Q. How many brakemen are usually required on four cars attached to an engine—switching four cars attached to an engine?

A. How many brakemen are required?

Q. Yes.

A. That is owing to where them cars is going.

Q. In switching cars.

A. Brakemen don't switch them.

Q. I mean when the engineer or engine is switching them.

(Testimony of J. M. Kline.)

A. You mean how many switchmen are required?

Q. Yes.

A. Some places they have more men to a crew than other places. We have three—four.

Q. How many are necessary at that time and place in switching up those four cars up that hill?

A. How many is necessary?

Q. Yes.

A. Why it could have been one or it could have been two—two of us was there.

Q. Is that all that was necessary to conduct the business of switching those cars as brakemen?

A. Yes, sir, we have went up there lots of times with only one man.

Q. You consider one man sufficient?

A. If he can get to see the engine crew and also throw switches.

Q. During the five years that you have been connected with the defendant at Clifton, have you ever known of an accident or anyone [362] killed as a result of switching cars as done by the defendant?

Mr. SEABURY.—We object. The question is entirely irrelevant.

The COURT.—Is that to meet the evidence that came in as to the two men killed?

Mr. McFARLAND.—Yes, sir.

The COURT.—I will admit it on that ground.

(By Mr. McFARLAND.)

Q. Was there ever an accident to one or more as the result of switching cars as was done on that track and up that Shannon switch during your connection

(Testimony of J. M. Kline.)

with the railway in the past five years?

Mr. SEABURY.—We object to the question on the ground already urged, and on the further ground that it is improper in form and calls for a conclusion of the witness.

The COURT.—I overrule the objection.

The WITNESS.—There was two men killed there by the narrow gauge ore train once.

(By Mr. McFARLAND.)

Q. But not by the defendant's trains?

A. No, sir.

Q. Was anybody ever killed at or near that place by the defendant's trains?

A. We never have killed but one man in that yard there, and that was after this accident happened.

Q. I mean at this place in switching cars.

A. No.

Q. Never was an accident there?

A. There was two accidents there but not with our crew.

Q. With a different crew? A. Yes, sir.

[363] Q. And not on the tracks of the defendant?

A. No, sir.

Q. But up on the Shannon switch? A. Yes, sir.

Mr. SEABURY.—We object to this testimony and ask that it be stricken out.

The COURT.—I think this is proper. There was a very damaging statement that went in I think by the witness Thompson—

Mr. KIBBEY.—No, Chambers—

The COURT.— —saying they had already killed

(Testimony of J. M. Kline.)

a man or two at that point, and I think it is fair the defendant should meet that.

(By Mr. McFARLAND.)

Q. Who were those people killed on the Shannon switch by the yard train?

A. There was only one killed down by the switches and another one about one hundred yards south of the switch.

Q. On what line? A. On the Shannon.

Q. Who were they? A. Both Mexicans.

Q. How were they killed?

A. Run over by a train.

Q. Do you know the circumstances?

A. One was drunk and walked in front of the train, and the other one was pulling a pin and the cars parted and he fell down between them. He had one foot on one car and one foot on the other pulling pins.

Q. That was not on any of the defendant's trains?

A. No, sir.

[364] Q. And not on the main line of the defendant?

A. The engine and the cars and the men were under the Coronado Railway's jurisdiction, but they were hauling Shannon ore at that time.

Q. Narrow gauge or broad gauge?

A. Narrow gauge.

Q. But I understand you to say that there never has been any accident or anyone killed on the road of the defendant by reason of the operation of their trains at that point as they were operated in switching.

(Testimony of J. M. Kline.)

A. No one ever hurt as I remember of or know of.

Q. Did you see Mr. Clark after the accident?

A. Yes, sir.

Q. How long after it was it before you saw him?

A. Oh, I should judge five or ten minutes. I helped carry him down to the Shannon crossing.

Q. On the engine?

A. From where he got off the engine, yes, sir.

Q. Did you notice his condition when you first saw him at the engine?

A. I asked him if he was hurt and he said he was—said his side hurt him and his hip hurt him.

Q. Was that the extent of the injuries?

A. That is all I remember of. His face was very dirty.

Q. Was there any blood on his face?

A. Not that I remember of.

Q. Any blood in the neighborhood of his eye?

A. I never saw any blood whatever.

Q. Any blood whatever on his face? A. No, sir.

[365] Q. Quite positive about that?

A. As near as I can remember. I saw his face. It was dirty—coal dust all over it.

Q. That was the extent of his complaint that you have stated?

A. I asked him if he was hurt and he said he was, that his hips hurt him and that his sides hurt him. So Gatti and I made a saddle out of our hands and let him put his arms around our necks and carried him to the road crossing and he said, "Let me down; I think I can make it all right." He said, "I don't

(Testimony of J. M. Kline.)

want to go home with you fellows carrying me. It will make my wife faint—make her sick." So I quit them at the crossing and I think that Mr. Gatti accompanied him down to his steps down to the yard.

Q. Did you see a party at the engine that day by the name of Jeff Dunagan?

A. Not that I remember.

Q. You have no recollection of seeing him there?

A. No, sir.

Q. Was Kelley there?

A. Kelley came there after the accident.

Q. Do you know where he was before?

A. I do not.

Q. Did you see Mr. Clark after that?

A. After the accident?

Q. Yes. A. Oh, yes, a number of times.

Q. Did he say anything about his condition?

A. I usually asked him how he was feeling and he would say his side was bothering him, "I didn't rest very well last night." Talked to me something like that. He told me about having his [366] ribs broken.

Q. Did he ever say anything to you about any injury to his head? A. No, sir.

Q. Did he complain of his head at the time of the accident? A. Not to me.

Q. Did he complain of it to anybody else in your presence? A. No, sir.

Q. You have described in a general way the causes that he complained of? So far as you remember?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. You don't remember of any other at the present time except as you have stated? A. No, sir.

The COURT.—We will take a recess at this point. Bear in mind the admonition of the Court about talking to anyone about this case, and be here to-morrow at half-past nine.

Thereupon the witness leaves the stand and the Court takes a recess.

Friday, November 15th, 1912.

At nine-thirty A. M. this day, the plaintiff being present in person and represented by counsel, and the defendant being represented by counsel, the jurors come into court and are called by the clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

J. M. KLINE, the witness on the stand at the closing of court on November 14th, is again called to the stand to testify on behalf of the defendant, and having been heretofore duly sworn in this case, testifies further as follows:

Direct Examination Continued.

[367] Mr. McFARLAND.—If the Court please, since adjournment of court yesterday, we have given some thought to the question as to the proper procedure in cases where the objection to a question is sustained, whether as a legal proposition under the practice in the territory it would be proper for us to follow up that question by making an offer. We find that the rule in the Supreme Court of the United States, which possibly may be the court of last resort in this case, has held that the rules and decisions of

(Testimony of J. M. Kline.)

the courts of last resort in the State from which the case comes will be controlling on that court. And in view of the further fact that the Supreme Court of this Territory has held in a case in which your Honor wrote the opinion—Territory vs. Fraley—that the Court would not consider that question unless the offer was made, we have decided that that being the proper practice, we now desire to make the offer.

The COURT.—The offer of proof?

Mr. McFARLAND.—We propose to prove by this witness in answer to the question that the objection was sustained to—

The COURT.—I don't remember what the question was now.

Mr. McFARLAND.—As to prior acts of negligence in respect to the operation of his engine in the switching of cars in obedience to signals. And now we propose to make that offer.

Mr. SEABURY.—I desire to object to the offer of proof in this connection, if your Honor please, upon the ground that the witness on the stand has been interrogated fully with reference to it and ample foundation laid for the purpose of the rulings of the Court upon those questions, and there can be no necessity or occasion for any further offer of proof in that connection.

The COURT.—I doubt if the Court can decline to permit [368] counsel to make any kind of offer.

Mr. SEABURY.—I ask that counsel be directed to proceed with his examination of the witness, if

(Testimony of J. M. Kline.)
his offer relates to what he intends to prove by this witness. The matter is entirely within the discretion of the trial court either to accept the offer or have the question put.

The COURT.—The Court should allow counsel the fullest opportunity to preserve the record.

Mr. SEABURY.—Unquestionably, and I offer no opposition to it at all. I will stipulate now, if your Honor will permit, that in the event of the bill of exceptions being presented to the Court by defendant for the purpose of reviewing the question whether or not the defendant may now offer evidence of prior acts of negligence on the part of the plaintiff in connection with this matter, I will consent it may go into the bill of exceptions as if the offer had been fully made at length.

The COURT.—I think what counsel has reference to is not only the offer but the statement that the evidence would be elicited from the witness—that it would come from the witness. Under the rule an offer is of no avail unless it is followed with the statement that witness would answer, if permitted to be interrogated upon that point, in a particular way.

Mr. SEABURY.—My understanding is that where there is nothing to impugn the good faith of the offer, the offer is made without further assurance that the witness would so testify if permitted to answer.

The COURT.—The rule varies.

Mr. SEABURY.—Of course I can't stipulate the

(Testimony of J. M. Kline.)

witness would so answer, because I don't think he would, and the purpose of my objection is to exclude it.

[369] The COURT.—I thought he had complied with the rule.

Mr. KIBBEY.—May we not make our offer in writing to the Court?

Mr. SEABURY.—Yes, indeed. I have no objection to that.

The COURT.—Then it may be done at any time later on, I presume. Are you through with this witness, Mr. McFarland?

Mr. McFARLAND.—Does the Court say that that can be made at any time?

The COURT.—Yes, before the evidence closes.

Mr. McFARLAND.—The only objection I have to that—

The COURT.—Judge, you are taking up so much time in this matter. If that arrangement is not satisfactory, of course we will have to proceed in some other way.

Mr. McFARLAND.—We have no complaint to make of the Court as to its action—we will endeavor to confine ourselves to the question.

The COURT.—That was a suggestion of Judge Kibbey's and I thought it was reasonable.

(By Mr. McFARLAND.

Q. Mr. Kline, you are familiar with the main line of the defendant's road near what is known as the San Francisco bridge to the Shannon switch?

A. Yes, sir.

(Testimony of J. M. Kline.)

Q. How often have you been over that road?

A. I have been over it a many a time—four or five times a day for five years.

Q. Have you been engaged in the operation of switching cars on that part of the line for that length of time?

Mr. SEABURY.—He testified fully as to that—

Mr. McFARLAND.—This is a preliminary question.

[370] The WITNESS.—Yes, sir, I have been engaged there.

(By Mr. McFARLAND.)

Q. You know the grade of that part of the road?

A. Well, I couldn't say the exact grade.

Q. And I understand you to say you have had experience in the operation of cars and the switching of cars? A. Yes, sir.

Q. Now, from that experience and knowledge of the operation of cars on that part of the defendant's railway, would you say that it would be a reasonably safe operation to permit cars to remain upon that part of the track without brakes being set or otherwise blocked or chocked?

Mr. SEABURY.—We object to the question. We think in view of the condition of the evidence in this case the question is incompetent, and the witness is invited to determine the matter before the jury.

The COURT.—I think that precise matter was ruled on before.

Mr. McFARLAND.—This is as to the same operation.

(Testimony of J. M. Kline.)

The COURT.—You are asking him his opinion as to whether that is safe or unsafe.

Mr. McFARLAND.—It is the same operation in switching cars on that part of the defendant's roadway. I say that because other witnesses have testified for the plaintiff that he was exercising care and was a reasonably prudent man, and that the cars would not stand upon that track without being secured in some way, and the vital question in this case as I understand it is whether they would stand or not.

The COURT.—Are you asking the witness to decide that matter?

Mr. McFARLAND.—I am asking him as a fact.

[371] The COURT.—It is necessarily a matter of opinion as to whether it is safe or unsafe. He may state what he knows as to the condition of the track and whether cars will stand without a brake and all that. But I think he has already testified as to that.

Mr. McFARLAND.—On that fact?

The COURT.—I think so.

Mr. McFARLAND.—May I ask him again?

The COURT.—Yes.

(By Mr. McFARLAND.)

Q. You say you are familiar with that track?

A. I am.

Q. And the operation of cars over it?

A. Yes, sir.

Q. Would cars ordinarily stand upon that track without brakes being set or otherwise secured?

A. They would.

Q. Now, as a result of your experience in the

(Testimony of J. M. Kline.)

operation of cars on that part of the line, didn't they almost uniformly stand without brakes?

Mr. SEABURY.—We object to the question—to the qualification—making the witness testify as to how frequently the cars remained in that position. Also on the ground that it is leading. Also that the witness has already answered the question fully.

The COURT.—The objection is sustained on the ground that it is leading.

Mr. McFARLAND.—Q. Did cars remain on that portion of the defendant's railway without brakes being set?

[372] Mr. KEARNEY.—We object to the question as leading.

The COURT.—He has already stated that fully—that the only occasions on which he knew of cars moving were this time and another time.

Mr. McFARLAND.—That is all.

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Kline, you say that cars would remain at this position of the track; isn't that dependent upon a variety of circumstances? A. No, sir.

Q. It is not? A. No, sir.

Q. It doesn't depend on the number of cars?

A. It doesn't.

Q. It doesn't depend upon whether the season of the year is summer or winter?

A. Cars will not roll in winter as easily as they do in summer.

Q. So it does depend in a measure on a variety of

(Testimony of J. M. Kline.)

circumstances, one among them that the season of the year is winter, for example.

A. That would have a tendency to freeze the wheels closer.

Q. Those cars would have a tendency not to roll early in the morning? A. Yes, sir.

Q. Would it make a difference whether cars had been recently moved from another position whether they would readily move on that incline or not?

A. No, sir, not in this country.

Q. Would a question of wind have anything to do with it?

[373] A. Owing to how strong the wind would be.

Q. So if the wind was sufficiently strong and blowing in a northerly direction, it might start the cars standing there without brakes, rolling, might it not?

A. They would have to be on a heavy grade and there would have to be a heavy wind.

Q. I am speaking about that particular grade.

A. No, sir, no wind would blow them cars.

Q. Is there a single or double track there on the main line?

A. There are three rails for a distance—that is, narrow gauge and wide gauge.

Q. Do other cars pass the main track on which those cars in question were on the 15th of March, 1911?

A. Did cars pass those cars left on the main?

Q. No—do cars pass on the other track—may cars pass on the other track?

(Testimony of J. M. Kline.)

A. I don't understand that question.

Q. All right, I will put it so you will. You say there are three tracks there— A. Three rails.

Q. I am asking whether it is a single track.

A. It is known as a single track.

Q. Containing three rails? A. Yes, sir.

Q. So there is no other track alongside of it on which cars will run?

A. No. That track can be used by a narrow gauge or a wide gauge, that is the only way.

Q. I don't recollect whether there was a double track [374] there or not. I see in this photograph, Plaintiff's Exhibit One, that there appears to be a freight-car north of the crossing and between the Shannon switch. I show you, Mr. Kline, and call your attention to the position of that freight-car there. (Exhibiting photograph to witness.)

A. That is not a freight-car, that is a narrow gauge ore-car sitting on the spur between the Shannon switch and the main line. You see here is the switch leading off. (Indicating.)

Q. That car could come north of the Shannon switch, could it not?

A. Oh, yes, it would go up here and up in the upper yards.

Q. Now, I ask you if there were four cars standing on the main line in the position in which these last four cars were that rolled of their own motion and if that ore-car was run up on the west side of the cars that moved and continued on down to the Shannon switch, would you say that it would be possible

(Testimony of J. M. Kline.)

for those cars to start rolling—the cars on the main track—if the cars on the main track didn't have any brakes set and were not blocked?

A. It is possible—it is owing to circumstances.

Q. Yes. Now, another thing: if there were any brakemen on the car that remained and they jumped on the cars, or if the cars received any jolt, that might start them? A. Yes, sir.

Q. So that when you told me in the first instance that substantially that the car would not move ordinarily, you meant that it was subject to these various circumstances we have just discussed?

A. Oh, yes, I didn't fully understand your question in regard to cars not moving at all.

[375] Q. Now, you say, as I understand you, that this engine operated by Mr. Clark was not stopped for about two hundred and thirty-five feet from the time you gave the signal to the time of the collision; is that your recollection?

A. I don't believe I stated the engine didn't stop in 235 feet.

Q. What did you state about 235 feet?

A. I stated from the time I gave my signal to where his engine was and to where the collision happened was about 235 feet.

Q. Now, at the time you gave the signal your car was backing up the switch?

A. Yes, sir, about a car and a half south of the switch.

Q. And consequently your position was changing every instant? A. We were moving, yes, sir.

(Testimony of J. M. Kline.)

Q. I don't quite get the estimate of 235 feet. Will you explain a little more fully?

A. As I stated, when I gave the signal I was about a car and a half south of the switch, which would make it about sixty feet south of the switch, so that left about two car-lengths and a half and the tender from me on the north side of the switch—and would make it a hundred and twenty feet.

Q. Now, tell us what the position of the engine was when it stopped, if you know.

A. The engine when it stopped was a car and a half south of where they side-swiped.

Q. Was it entirely past the switch?

A. Oh, yes.

Q. Had it entirely passed the frog?

[376] A. Yes, sir.

Q. Can you say within what space the engine stopped from the time you gave the signal? Within what space did it stop?

A. I couldn't say; that would be a guess.

Q. Now, Mr. Kline, you said you had never operated this engine, didn't you?

A. No, sir, I did not.

Q. Have you operated that engine?

A. I have.

Q. You have never tested within what space it could stop, though, have you?

A. Well, only just pulling up to a switch and trying it with a light engine.

Q. Mr. McFarland asked you those questions and you said you never made any test or had been present

(Testimony of J. M. Kline.)

when a test was made. A. No, sir.

Q. You know that Clark has been in the business of railroad engineer for many years?

A. Yes, sir, I think he has been in the railroad business about forty years.

Q. Do you know that he has been connected with the road for approximately thirteen years before this accident?

A. Well, he has been connected with it ever since I have been there—about twelve years.

Q. How old are you? A. I am twenty-eight.

Q. Do you know how old Mr. Clark is?

A. Why, I couldn't say for certain, but I think he is about sixty-seven years old.

[377] Q. Now, do you mean to tell this jury that you know more about stopping this engine than he does? A. I do not.

Q. You don't mean to say that, do you?

A. No, sir.

Q. Now, Mr. Kline, you were foreman in that yard, were you not? A. I was.

Q. St. Thomas was under your direction, was he not? A. He was.

Q. Kelley was over you? A. Yes, sir.

Q. Was Kelley in the yard at the time this occurred in March, 1911? A. In the yard?

Q. Yes.

A. I couldn't say where Kelley was.

Q. He wasn't in sight of this transaction?

A. Not until after it happened.

Q. That is what I mean.

(Testimony of J. M. Kline.)

A. That is, not that I know of. I didn't see him until after the accident.

Q. About how far away did you say those moving cars were when you first gave the washout signal?

Mr. BENNETT.—How far away from what?

(By Mr. SEABURY.)

Q. From the moving cars.

A. How far I was away from the cars that was moving?

Q. How far away were the cars that were moving down the main track from you at the time you first saw them moving?

[378] A. I don't think they had gone more than five or six feet. They had just started to creep.

Q. They had just begun to creep? A. Yes, sir.

Q. Can't you estimate the distance they were from you at the time you saw them moving?

A. Well, I should judge that they were about seventy feet from the car that I was on.

Q. About seventy feet from your car?

A. Yes, sir.

Q. Now, as I understand you, the instant that you saw those cars moving you immediately gave the washout signal. A. Yes, sir.

Q. That signal was given by you to be received by one of two men? A. Yes, sir.

Q. Either St. Thomas or Chambers?

A. Yes, sir.

Q. Now, as I understand you, at the time you gave the signal, St. Thomas was gazing around the country? A. He was.

(Testimony of J. M. Kline.)

Q. What part of the country?

A. That is, I can't say he was right at the time I gave the signal, but when I ran up and went for the brake he was not looking at me.

Q. He was still sitting still?

A. Yes, sir. I had to holler to attract his attention. I thought the cars were going to side-swipe the cars he was on, and if they had it would have cut off the legs.

Q. If he had paid attention he would have received your [379] signal?

A. He might have seen my signal and passed it to the engineer and then been looking around at some place else.

Q. Do you think it likely that St. Thomas would receive a washout signal—a highly dangerous signal—and then after transmitting it to the fireman he would resume gazing around the country?

A. It might be possible.

Q. Now, you have worked with St. Thomas have you not? A. Yes, sir.

Q. Let's have the best opinion you can give as to whether it is probable St. Thomas would resume gazing around the country after getting a washout signal.

A. That is my best opinion. He might have after he gave my signal to the engineer.

Q. At any rate, Mr. Kline, as I understand you, then you don't say St. Thomas didn't get the signal?

A. I do not.

Q. How many signals did you make?

A. Two, if I remember right.

(Testimony of J. M. Kline.)

Q. How far apart were they?

A. Just as fast as I could raise my arms.

Q. Just as fast as you gave one you repeated it?

A. Yes, sir.

Q. Do you mean to say that if St. Thomas hadn't been looking around the country, as you describe it, that he would have acted any more promptly than he did in response to your signal?

A. No, sir, I don't. He did all he possibly could if he got the signal and passed it to the engineer, unless he wanted to jump off.

[380] Q. But he didn't jump off? A. No, sir.

Q. He stayed with it? A. Yes, sir.

Q. And so did Mr. Chambers?

A. So far as I know; I didn't see any more in the engine—I ran for the brake, is all.

Mr. SEABURY.—That is all.

Redirect Examination.

(By Mr. KIBBEY.)

Q. The fireman could see you?

A. He is the only man on the engine that could see me.

Q. By reason of being around the curve?

A. Yes, sir.

Q. You could see the fireman?

A. I could if I looked for him.

Q. You could look right into the cab?

A. Yes, sir.

Q. Nothing to obstruct the view between yourself and the fireman? A. Nothing whatever.

Mr. KIBBEY.—That is all.

(Witness excused.)

[Testimony of J. T. Kelley, for Defendant.]

J. T. KELLEY, being called as a witness in behalf of the defendant and duly sworn, is excused from the witness-stand temporarily.

Mr. McFARLAND.—If the Court please, before examining this witness I would like to ask Mr. Thompson just one question.

[Testimony of A. T. Thompson, for Defendant (Recalled).]

A. T. THOMPSON, being recalled as a witness in behalf of the defendant, and having been heretofore duly sworn in this [381] case, testifies further as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your business, Mr. Thompson?

A. I am general manager of the Detroit Copper Mining Company.

Q. You are not now connected with the Arizona and New Mexico Railway Company? A. No, sir.

Q. As an officer? A. No, sir.

Q. Or in any capacity? A. No, sir.

Q. When did you sever your connection with that company? A. In July of this year.

(Witness excused.)

[Testimony of J. T. Kelley, for Defendant (Recalled).]

J. T. KELLEY, being recalled as a witness in behalf of the defendant and having been heretofore duly sworn in this case, but not examined, testifies as follows:

(Testimony of J. T. Kelley.)

Direct Examination.

(By Mr. McFARLAND.)

Q. Please give your name to the reporter, Mr. Kelley. A. J. T. Kelley.

Q. Where do you live?

A. At Clifton, Arizona.

Q. How long have you lived there?

A. Thirteen years, a little better.

Q. What is your business?

A. Yardmaster for the A. & N. M. Railway at Clifton.

Q. How long have you been in the employ of the company in that capacity?

[382] A. Some four or five years.

Q. In what capacity did you serve the company previous to that time, if any?

A. Brakeman, switchman and conductor.

Q. Do you know Henry Doran? A. Yes, sir.

Q. How long have you known him?

A. Why, I have known Mr. Doran ever since he came to Clifton, I believe; I don't know how long that is, though.

Q. Did you hear the testimony of Mr. Doran when he was on the stand? A. Yes, sir.

Q. As a witness in this case?

A. Yes, sir.

Q. And particularly in reference to a conversation with you? A. Yes, sir.

Q. State whether or not you ever had such a conversation with him. A. I did not.

Q. He testified that he told you about the danger-

(Testimony of J. T. Kelley.)

ous condition of this track by leaving cars there without brakes being set. Did you ever have any conversation with him on that subject? A. No, sir.

Q. At that time? A. No, sir.

Q. Or at any other time?

A. Or at any other time.

Q. Did you ever tell him you would not have the brakes set? A. No, sir, I did not.

[383] Q. You are familiar with that track?

A. Yes, sir.

Q. Are you familiar with the operation of trains?

A. Well, I have had what experience I have had in Clifton in the operating of trains. I claim I am familiar with the way they should be operated around there.

Q. You have been familiar with the operation of the switch engine and switching crews around that part of the track, how many years?

A. I have been over that track now, off and on, for nine years. I have been in charge of the switch engine as yardmaster there for better than five years now.

Q. Do you know whether freight-cars left upon that part of the track between the San Francisco river and the Shannon switch would remain standing without the brakes being set? A. I do.

Q. How long have you known of cars remaining on that part of the track standing without brakes being set?

A. How long have I known it at one time?

Q. How long have you known during that time?

(Testimony of J. T. Kelley.)

A. Every day we would have more than one drag of cars to take up the Shannon hill. If we had more than one trip to make we would leave some of them on the main line. That would happen nearly every day whenever we had more than one trip up.

Q. Would you switch cars up the Shannon switch every day?

A. Well, every day there was any cars in there for us to switch to Shannon; yes, sir.

Q. And what would the probable average of cars switched up there daily be?

[384] A. Well, day in and day out, probably twelve or fourteen cars a day, up to eighteen or twenty, and down as low as four or five.

Q. During all that time cars were left standing on that part of the track?

A. Any time that I have been with cars and doing the work there I have always left them on that track up to that time.

Q. During that five years do you know of any instances where a car did in fact move?

A. I never saw a car move there only by power—locomotive power.

Q. Did you see Mr. Clark on the day of the accident? A. Yes, sir.

Q. How long after? Were you there when the accident occurred?

A. No, sir, not present when the accident occurred.

Q. Where were you?

A. Between the depot and the point of the accident.

(Testimony of J. T. Kelley.)

Q. From what point did you come?

A. I was coming south through the yards from the depot.

Q. Did you see him?

A. I saw him after the accident.

Q. How long after the accident?

A. I wouldn't say—probably a minute or a minute and a half or two minutes, how long it would take me to get from where I was to where he was.

Q. Did you see the accident? A. No, sir.

Q. You were not where it was visible to you?

A. No, sir. I couldn't see from where I was where the accident happened.

[385] Q. Where was he when you first saw him?

A. Mr. Clark—he was sitting or lying on the ground there by the spur switch at the Shannon switch.

Q. Did you have any conversation with him?

A. I asked him if he was hurt and he said he thought he was hurt. I asked him if he was hurt very bad and he said he didn't know how bad he was hurt, but hip and side was hurt.

Q. Anything else?

A. That is all he said to me.

Q. The only complaint he made was about his side?

A. That is all—his side and hip—he put his hand on his back and said his side and hip was hurt.

Q. Did you see his face?

A. Well, I was talking to him.

Q. Looking into his face? A. Yes, sir.

Q. Was there any blood or bruises on his face?

(Testimony of J. T. Kelley.)

A. I didn't see any that I know of. I didn't see any. No blood and no bruises that I know of.

Q. Did he make any complaint to you about bruises or injury to his face? A. No, sir.

Q. Or head? A. No, sir.

Q. Did you see a fellow there by the name of Jeff Dunagan?

A. Can't say that I did. There were several people around there—can't say whether I saw him or not.

Q. Do you know him? A. Yes, sir.

Q. Know him well? A. Yes, sir.

[386] Q. If he had been there you would probably have seen him?

A. That is what I say. Chances is he was there and I seen him and not remember it, but I wouldn't say I seen him.

Q. How long has Mr. Clark been operating that engine in switching cars there in that yard?

A. Well, I think up to that time about two years Mr. Clark had been on that engine, around about that time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the court.

(To the witness.)

(Testimony of J. T. Kelley.)

Q. Do you know of any instances prior to the accident, say within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—We except. Now, if the Court please, we offer to prove by this witness that Mr. Clark for two years previous to this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost daily within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

[387] Mr. SEABURY.—We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The COURT.—The ruling made will stand.

Mr. McFARLAND.—It is denied?

The COURT.—Yes.

Mr. McFARLAND.—To which we except.

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Kelley, who were the men under your direction and control? A. Mr. J. M. Kline.

Q. You gave orders to him in connection with moving cars in the yard? A. Yes, sir.

(Testimony of J. T. Kelley.)

Q. Now, you say you have been engaged there as yardmaster for many years, and that you never refused to set brakes on cars standing on that piece of track at the request of Mr. Doran?

A. I say I never refused to set brakes on that piece of track for Mr. Doran.

Q. Did any other person ever ask you to have those brakes set? A. No, sir.

Q. Never did?

A. Not that I am aware of, no, sir.

Q. You knew that there was a grade there, didn't you, in March, 1911? A. A grade?

Q. Yes. A. You mean a railroad grade?

Q. Yes.

A. Why, there is a track there for cars to run on.

[388] Q. But there is an incline there in the track, isn't there—a downgrade?

A. I can't say there is any downgrade there between that point there.

Q. Between the crossing and the Shannon switch?

A. Between the crossing and the Shannon switch? Downgrade which way?

Q. I asked you whether there was any incline there. A. Was there an incline there?

Q. Yes. A. Not that I know of.

Q. Was there any grade one way or the other?

A. The way I would say, if there was any grade there was a little down from the Shannon switch going south of probably, well, two cars and a half or three cars—just practically level, but the track would be inclined to be down for about that distance.

(Testimony of J. T. Kelley.)

Q. So, whatever incline there was would pitch in a northerly direction? A. No, sir.

Q. It would not?

A. No, sir, not from that point where I say.

Q. Take it from that point north of the railroad crossing and between the Shannon switch and the railroad crossing—is that an absolutely level piece of track or not?

A. Well, I always thought it was practically level.

Q. I mean in March, 1911. I don't mean now.

A. I mean all the time, right up—

Q. You mean all the time?

A. Yes, any time I have been there.

[389] Q. Has that track remained in the same condition ever since March, 1911?

A. That track has been worked on since March, 1911.

Q. You mean that it has been altered or changed?

A. The section foreman has done some track work on there since then.

Q. I ask you whether it is in the condition it now is in March, 1911.

A. It was in the same—it is not in the same condition now as March, 1911.

Q. What I particularly want to know from you is whether you think in March, 1911, there was any incline or downgrade on that track between the crossing and the Shannon switch.

A. Between the crossing and the Shannon switch?

Q. Yes. A. I do.

Q. You do think there was a downgrade?

(Testimony of J. T. Kelley.)

A. Yes, sir.

Q. How much?

A. I can't say how much, but I think for two and a half or three cars it was inclined to be a little down.

Q. Now, you say, as I recall it, that you never saw cars move except by motive power in that particular place. A. Yes, sir.

Q. Did anyone ever tell you cars moved there without motive power at that place?

A. Has anybody ever told me cars has moved?

Q. Yes. A. Yes, sir.

Q. Did anyone ever tell you that before March, 1911? [390] A. I can't say.

Q. Would you say no one did tell you that before March, 1911?

A. I wouldn't say nobody told me, either.

Q. You knew it was downgrade before March, 1911, did you not?

A. I said I knew it was a little downgrade there.

Q. What I mean is, you knew that it was prior to March, 1911, did you not? A. Yes, sir.

Q. Now, the fact is, as I understand you, you never did cause brakes to be set on cars standing in that particular place.

A. I have never given any instructions to have brakes to be set on that one particular place; no, sir.

Q. Did you ever give any instructions to have cars blocked in that particular place? A. No, sir.

Q. Have you ever seen cars move without motive power on any kind of a track, Mr. Kelley?

(Testimony of J. T. Kelley.)

A. Have ever I seen cars move without motive power on any kind of a track?

Q. Yes, sir. A. Yes, sir.

Q. What kind of a track was that?

A. Grade and also level track. I have seen cars move on level track.

Q. Without power? A. Without power.

Q. What made those cars move?

A. I have seen where they have moved.

Q. What made them move? Didn't that have some power to start them?

[391] A. I couldn't say what caused them to move at all, sir.

Q. Was there any engine on those cars either way when you saw them move?

A. I say I know of them moving.

Q. But you didn't see it yourself? A. No, sir.

Q. Now, isn't it a fact that if one or more freight-cars had been left standing on this Shannon switch without brakes set and without being blocked, would those cars have moved without any motive power—do you understand what I mean? I show you Plaintiff's Exhibit One and direct your attention to the siding or switch called the Shannon switch—

A. Yes, sir.

Q. That track had a more inclined grade—a steeper grade—than the main track?

A. This Shannon switch?

Q. Yes. A. Yes, sir.

Q. Now, I ask you as a railroad man, if one or more freight-cars had been left standing on that

(Testimony of J. T. Kelley.)
portion of the Shannon switch to which I have directed your attention, would that car move or would it not move without motive power if the brakes were not set and if it were not blocked?

Mr. KIBBEY.—We object to the question. There is no evidence that any cars have been left there—it throws no light on this subject at all—unless the conditions were similar.

Mr. KEARNEY.—The examination of Morton shows the grade there.

The COURT.—The same grade?

Mr. SEABURY.—No, a different grade entirely.

The COURT.—The objection is sustained.

[392] (By Mr. SEABURY.)

Q. Do you know the difference in grade between that portion of the Shannon switch and the portion of the main line between the crossing and the switch? A. No, sir.

Q. All you know is that the Shannon switch is a steeper grade than the main line?

A. Yes, sir; it is steeper going up Shannon than on the main line.

Q. Now, in the course of your years' experience there, Mr. Kelley, you have said, as I understand you, that you did not think it was necessary to have the brakes set in standing cars on the main line?

A. Yes, sir; I didn't think it necessary to have brakes set on them cars.

Q. Now, I ask you to tell me whether you think it is necessary to set brakes on cars if left standing on the Shannon switch?

(Testimony of J. T. Kelley.)

Mr. KIBBEY.—We object to that.

The COURT.—I sustain the objection.

Mr. SEABURY.—I think I am entitled to that, but I won't argue it if the Court doesn't wish me to.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know, Mr. Kelley, on what kind of a grade a car will move without any motive power if not braked and not blocked?

A. I don't quite understand.

Q. Do you know how steep a grade would have to be before a freight-car which is not braked and not blocked would move of itself?

[393] A. No, I do not.

Q. You don't know. Did you ever try to find out?

A. No, sir.

Q. And although for a period of some five years you were yardmaster in that yard and knew that there was some grade or incline on the main track and knew that cars were repeatedly being placed there without brakes, you never made any effort to find out how steep that grade was?

A. I never thought it necessary for there was not enough grade there for a car to start on.

Q. That is simply your opinion of it.

A. That is my opinion.

Q. Would that opinion in any way be affected or changed if people told you that they had seen cars move there repeatedly when they were not braked

(Testimony of J. T. Kelley.)

and not blocked? A. Would that affect me?

Q. Yes.

A. By me not leaving freight-cars without brakes?

Q. Yes. A. No, sir.

Q. That wouldn't affect your opinion at all?

A. No, sir.

Q. In other words, you would rather have your own opinion than the positive statements of another man that he had seen it take place?

A. I will say that—I didn't say—pardon me, put that to me again, will you?

Q. Yes, indeed. I say, you would rather rely upon your own opinion that cars would not move on that grade than you would upon the statement of some man who had seen cars move under those conditions.

[394] A. My opinion is that cars would not move on that grade any time I left them there or any time I seen them left there on that piece of track.

Q. Now, Mr. Kelley—

Mr. KIBBEY.—I want to object to the form of the question.

Mr. SEABURY.—I haven't put the question.

Mr. KIBBEY.—You were going to repeat the question.

Mr. SEABURY.—Possibly not.

Mr. KIBBEY.—Put the question, then.

(By Mr. SEABURY.)

Q. Whether or not the car would move at that place would depend on different questions, would it

(Testimony of J. T. Kelley.)

not? A. On different questions?

Q. I will put it this way: Suppose cars were standing on that track without brakes being set and without being blocked and another car butted into them, I ask you whether in your opinion that jar or jolt would be sufficient to make those cars run down that track to the Shannon switch?

Mr. KIBBEY.—We object to the question. There is no evidence of a car butting into any cars here.

The COURT.—I sustain the objection.

(By Mr. SEABURY.)

Q. Do you know whether a strong wind would be sufficient to place cars left between the crossing and the Shannon switch on the main line without brakes and without being blocked, in motion?

A. Do I know if a strong wind would?

Q. Yes. A. I do not.

Q. You don't know? A. No.

Q. Do you know whether cars would more easily move in that [395] part of the track in the winter time than in the summer time?

A. Move more easily in the winter time than in the summer time?

Q. Do you know whether they would move more easily in one season of the year than another?

A. No, in cold weather a car won't move as easily as in warm weather—that is, the oil and waste is more solider in the boxes and cars will not move as easy.

Q. Now, a car that has been in motion for a con-

(Testimony of J. T. Kelley.)

siderable period of time and then placed at a standstill will move more easily than one that has not been moved for some time?

Mr. KIBBEY.—We object to the question. There is no evidence that these have been in motion a considerable length of time.

The COURT.—I think that question may be answered.

(By Mr. SEABURY.)

Q. What do you say about that? Would cars move of their own motion more easily if they had been placed at a standstill after having been moved for some slight distance than if they had been standing there before having been previously moved?

A. Might have a tendency to cause them to move more readily. I wouldn't say just how easy.

Q. Now, as I understand you, you don't pretend to say Mr. Dunagan was not present?

A. No, sir, I didn't say Mr. Dunagan was there.

Q. You were in court when Mr. Dunagan said he was there?

A. I heard Mr. Dunagan say he was there, yes, sir.

Mr. SEABURY.—That is all.

Redirect Examination.

(By Mr. McFARLAND.)

Q. In reply to a question of counsel, you said you never **[396]** gave instructions to set brakes on that particular part of the track when cars are left standing on that track. Why do you say you never gave instructions?

(Testimony of J. T. Kelley.)

Mr. SEABURY.—We object to the question.

The COURT.—Why does he say so, or—

Mr. McFARLAND.—Why did he give such instructions?

The COURT.—He just stated the reason *why was* he didn't think it was necessary.

(By Mr. McFARLAND.)

Q. Do you remember the kind of a day that was—whether hot or cold?

A. Well, it wasn't what you call right freezing weather that I remember of, but it was a fine day.

Q. Was there any wind blowing?

A. Not that I remember, there was no wind.

Q. Now, I understand you to say that the grade of that road inclines two or three car-lengths south—inclines down a little two or three car-lengths from the switch south.

A. That is what I said.

Q. Then from that point to the crossing of the road—the wagon road—at the Shannon store it is practically level?

Mr. SEABURY.—We object to the question.

(By Mr. McFARLAND.)

Q. I understand you to say that.

Mr. SEABURY.—We object.

The COURT.—What did you say in reference to that?

The WITNESS.—It is practically level up to the crossing there, that is what I say it is.

(By Mr. McFARLAND.)

Q. Was that the condition on the 15th of March, 1911?

(Testimony of J. T. Kelley.)

[397] A. It was that way right along there.

Q. It is practically the same now?

A. Practically the same now; about the same thing now.

Mr. McFARLAND.—That is all.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of J. G. Lindsey, for Defendant.]

J. G. LINDSEY, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. State your name, please.

A. J. G. Lindsey.

Q. Where do you live? A. In Phoenix.

Q. What is your business?

A. Assistant superintendent of the Arizona Eastern.

Q. How long have you been engaged in railroading? A. About thirty years.

Q. In what capacity?

A. I started in as telegraph operator, worked as train dispatcher, chief dispatcher, train-master and assistant superintendent.

Q. What are the duties of train-master?

A. The train-master's duty is to have supervision of all outside movement of cars, trains and yards and the trainmen.

Q. How much experience have you had in the observation and direction and consideration of the

(Testimony of J. G. Lindsey.)

movement of cars? A. Twelve years.

Q. Suppose, Mr. Lindsey, there was a track that had a slight grade running from a switch—the grade having a slight tendency **[398]** down for a slight grade for two or three car-lengths and then practically level for a considerable distance—what would be the probability of loaded cars being stopped on that track—what would be the probability of their moving of their own accord?

Mr. SEABURY.—We object to the question on the ground that it is not sufficiently clear to enable the witness to answer.

The WITNESS.—I was going to ask to have it made more clear.

The COURT.—In what respect—the grade not established?

Mr. SEABURY.—Yes, and the surrounding circumstances are not at all as described by the witnesses.

Mr. KIBBEY.—The question is clear enough to me. Does the witness understand the question?

The WITNESS.—I understand the question, but would like to ask a question before replying.

(By Mr. KIBBEY.)

Q. Yes.

A. I would like to know what per cent the grade is.

Q. I will give you that. Beginning at the switch on the main line and then running south from the switch on the main line, the grade for the first twenty-five feet is down away from the switch two-

(Testimony of J. G. Lindsey.)

tenths of one per cent, and then for the next seventy-five feet it is one-tenth of one per cent grade down away from the switch, and the next twenty-five feet it is twenty-eight one-hundredths of one per cent down away from the switch—

A. Is that down all the way in the same direction?

Q. Yes. Then for the next fifty feet it is one-tenth of one per cent down away from the switch; it is then for the next twenty-five feet one-tenth of one per cent grade up, and for the next twenty-five feet it is one-tenth of one per cent grade down **[399]** away from the switch, the next twenty-five feet it is one-tenth of one per cent grade up from the switch; the next twenty-five feet is one-tenth of one per cent grade down away from the switch; then the next twenty-five feet it is forty-eight one-hundredths of one per cent up. Now, suppose four loaded cars were left standing upon that track stationary when left by the engine, what would be their tendency to roll or move of their own volition?

Mr. SEABURY.—We object to the question. It is not properly framed as a hypothetical question—too vague and indefinite, and having no sufficient application to the facts of this case.

The COURT.—He may answer.

Mr. SEABURY.—We except.

The WITNESS.—As I understand it, all the grade back from the switch is down away from the switch excepting two points, one of which is one-tenth of one per cent and one forty-eight one-hundredths; is that right?

(Testimony of J. G. Lindsey.)

Mr. KIBBEY.—For a hundred and seventy-five feet it is down.

Mr. SEABURY.—We object to that as constituting testimony on the part of counsel—the witness is interrogating counsel.

The COURT.—He is interrogating him as to the hypothetical question.

Mr. SEABURY.—As to the fact.

The COURT.—As to the fact assumed in the hypothetical question, isn't that true?

Mr. KIBBEY.—Yes.

The COURT.—He may answer.

The WITNESS.—On a level grade a loaded car will develop a resistance of eighteen pounds per ton —that is, it would take an energy equal to eighteen pounds per gross ton, twenty-two hundred and forty, to move that car on level grade, and on a one per [400] cent grade we add twenty pounds resistance to the grade per one per cent.

Mr. SEABURY.—I move to strike the answer out on the ground that it is not responsive.

The COURT.—I think it is partly responsive—part of his answer.

The WITNESS.—I had not finished. On this grade of one per cent down, cars would have a tendency, if moved at all, to go away from the switch—that is, in the direction the grade is down. Before we move them at all we would need energy of about sixteen pounds per ton to move them in any direction.

Mr. KIBBEY.—Q. Now, what would you say with respect to those cars moving at all, and if they moved

(Testimony of J. G. Lindsey.)

at all of their own volition, in what direction?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

The WITNESS.—The cars wouldn't move at all of themselves under those conditions, but if moved by wind they would have a tendency to go downhill, of course, which is the way the grade runs.

(By Mr. KIBBEY.)

Q. In the operation of switching from the main line on the grades as I have described, in practice, would you regard it as necessary to set brakes on those cars?

Mr. SEABURY.—We object to the question on the ground that the witness is not shown to be properly qualified to answer it.

The COURT.—So far as that is concerned I think the witness has shown himself *prima facie* competent.

[401] Mr. SEABURY.—On the ground that the witness is asked to state whether the usual course of practice of the defendant is safe or unsafe—that is the practical effect of this question.

The COURT.—No, I don't think so.

Mr. KIBBEY.—The ordinary course of railroading.

The COURT.—What is the question?

Mr. KIBBEY.—Whether or not in the ordinary practice it is regarded as necessary to set brakes to hold those cars on a grade of that kind.

(Testimony of J. G. Lindsey.)

The COURT.—I didn't understand the question. The objection is sustained to that.

(By Mr. KIBBEY.)

Q. Do you, in the ordinary course of your practice with grades of that character in the operation of cars, direct brakes to be left set on cars standing?

Mr. SEABURY.—We object to the question. This witness cannot act as the measure of the standard of care as it may affect the acts of the defendant in this case. It is incompetent and should be excluded.

The COURT.—I think that point is well taken.

Mr. KIBBEY.—My suggestion is that what is regarded generally as the practice in a matter of this kind is to be taken into consideration in determining whether or not they are exercising care. If a man performs an operation in one way and another in another, it is evident which is the best and safest, and by taking the general practice—if things are done usually over the country in that particular business—then it is not negligent, I would take it, if in this particular instance it was done in that way.

The COURT.—If the defendant has exercised ordinary care.

Mr. KIBBEY.—I am not asking for ordinary care; I am asking what [402] the practice is.

The COURT.—I doubt if the practice establishes the rule of negligence.

Mr. KIBBEY.—In the very nature in which they are using it, it is described the practice and that in itself does constitute negligence—the application of

(Testimony of J. G. Lindsey.)
safety appliances. If you want to prove the dangerous condition of a machine, you compare it with the machines used in general practice throughout the country.

The COURT.—The best device, yes.

Mr. KIBBEY.—Yes, the best device. Why isn't it equally true as to the best methods of operation?

The COURT.—I don't think anyone would say this was the best method of insuring safety. Your question is directed to ascertaining what is the custom of railroads in regard to putting on brakes on cars standing in similar situations.

Mr. KIBBEY.—I didn't ask for the practice—

The COURT.—You are getting at that question.

Mr. KIBBEY.—I am getting at the question of practice under those circumstances. The methods employed by railroads under those conditions.

The COURT.—This is the absence of method you are proving—whether the absence of any method is the practice of railroads under similar conditions. I doubt if the absence of any safety appliance—no matter if it is an established custom—would be considered as determining the fact whether the company was negligent or not.

Mr. KIBBEY.—There is no question but what this could be made absolutely safe, but that is not the measure of care required. They could have taken up the rails so the cars could not have [403] rolled down on to this switch.

The COURT.—That is apparent; but the question is not whether companies generally use protections

(Testimony of J. G. Lindsey.)

under those circumstances. If, as a matter of fact, some measure of protection is reasonably necessary in order to safeguard employees, that would not be determined by the practice of railroads, but by the conditions.

Mr. KIBBEY.—It cannot be determined by anything else.

(Thereupon the question is argued further to the Court by counsel for the defendant.)

Mr. SEABURY.—Our position is as I have stated, and the very purpose of the jury is to determine from the facts proved whether the particular act was carefully done or negligently performed. In order to establish the fact of negligence or want of care both sides are permitted to set before the jury all the facts relating to that particular circumstance, and from those facts and those surrounding circumstances the jury as experienced men will tell us whether care was exercised or not in that particular instance, but it can in no way constitute evidence relating to that particular action to bring in Tom Jones and Smith and have them tell us they always did that. How do we know they may not have been grossly negligent? Surely no witness would be permitted to come here and say we never had any objections to so arranging our track that two freight-cars collided together.

The COURT.—If ordinary care—and ordinary care is to be determined from the facts and circumstances as they exist—did not require a particular effort on the part of the railroad company to protect their employees under these circumstances, then

(Testimony of J. G. Lindsey.)
there was a freedom from negligence. How do you establish that?

Mr. SEABURY.—Only by the surrounding situation and facts as [404] they relate to this case. It must be a question of facts for the jury to determine. No witness may be permitted to say that in the course of my business I have done thus and so when it is not the question of the adoption of some safety device.

The COURT.—It is a question of whether the danger is so remote that a reasonably prudent person could not anticipate it happening.

Mr. SEABURY.—That can only be inferred from what happened in this particular case.

The COURT.—If it is a common-sense proposition that a man with ordinary reasoning powers could determine that question, such evidence as this is wholly unnecessary, but this does call, I should say, for something in the nature of special information—the jury is not expected to know on what grade a car will move of its own weight, or what the probabilities are of its moving under any of the circumstances testified to.

Mr. SEABURY.—The evidence is already replete, if your Honor please, upon the question of what was done in this case. All of the acts performed by both parties are fully before the jury.

The COURT.—Suppose this was the only instance of the kind that men have ever known of—there are things that have occurred in this way that are unique—there might have been a ground swell there—those

(Testimony of J. G. Lindsey.)

are remote possibilities. Suppose this moving of the cars was something that no man—no reasonable man—could expect or conceive, and yet it happened? You wouldn't say from the fact that it happened his negligence had therefore been established.

Mr. SEABURY.—I think I would in this instance, because persons engaged in this particular business are charged with a high degree of care—the standard of care and its exercise are extremely high. Now, if two cars collide, as I have said, that of itself [405] is a strong indication that somebody was negligent in the matter.

The COURT.—Those are presumptions, but the question after all is to determine whether care was exercised. Now, the care required is the care which prudent men would exercise under the same conditions of safety. What may result from lack of care? If simply a little property loss might result, it is a different thing from what may result from the destruction of life. A reasonable man would take greater precaution of life. A reasonable man would take greater precaution in one instance than in the other. So ordinary care is what could be exercised by ordinarily prudent men engaged in this business. If this was an unforeseen thing—that is, if it could not have been foreseen as at all likely to happen, that is a thing which I think the jury have a right to consider.

Mr. SEABURY.—We think the evidence is extremely harmful to the plaintiff and prejudicial.

The COURT.—If it bears upon the question of

(Testimony of J. G. Lindsey.)

probability of the thing happening, it might be admissible.

Mr. SEABURY.—May I suggest right here that there is no question but what it happened—no question of how it happened. Their own witnesses have testified to that.

The COURT.—But if it was a most unusual occurrence then the jury have a right to know that.

Mr. SEABURY.—They would undoubtedly have a right to consider the unusual occurrence if it was unusual.

The COURT.—We only get our knowledge largely from experience.

Mr. SEABURY.—But this evidence would not tend to prove whether those persons exercised care or did not.

The COURT.—I should think so. If this was a unique accident almost in the annals of railroading, or occurred so infrequently under the same conditions as to be almost—that is the chance [406] would seem to a reasonable man to be negligible—would he still be required to take the precaution?

Mr. SEABURY.—Suppose a car is left stationary upon a main line and an express train comes along the main line and runs into it—that is a decidedly unusual occurrence in railroading—

The COURT.—A frequent occurrence—I have read of those things very, very often.

Mr. SEABURY.—There is no question about that being a negligent act, and I contend that certainly no other railroad man would be permitted to come in

(Testimony of J. G. Lindsey.)

and say in our practice we have allowed cars to remain in this condition.

The COURT.—The question is whether that really does establish the thing or not.

Mr. McFARLAND.—May I refresh the Court's memory on a case before the Supreme Court of this Territory—the case of Lyons—the one question there was whether the conditions existing under that shed was a reasonably safe operation or was it not.

(Thereupon the question is argued further to the Court—the further argument not being taken down by the reporter.)

The COURT.—(At the conclusion of the argument.) I am in doubt about it, but I presume the rule should be not to exclude the evidence if it is clearly not immaterial. Perhaps there is less risk in letting it go in than to exclude it. The Court can subsequently cover the matter by his instructions if there is any doubt about it.

Mr. SEABURY.—Your Honor will receive it?

The COURT.—Yes.

Mr. SEABURY.—Permit me to except.

Mr. KIBBEY.—Will the reporter please read the last question?

(Thereupon the reporter reads the following question: Q. Do you in the ordinary course of your practice with grades of that character [407] in the operation of cars, direct brakes to be left set on cars standing?)

The WITNESS.—Not in switching operations.

The COURT.—Is that all?

(Testimony of J. G. Lindsey.)

(By Mr. KIBBEY.)

Q. Have you had experience, either in the operation itself or by observation, of the space within which switch engines can stop themselves and the cars attached to them? A. Yes, sir.

Q. Suppose there is an engine weighing about one hundred and twenty-four thousand pounds, that has straight air as well as the automatic—that is attached to four cars—loaded cars—practically forty tons to the car—upon a level track, partly standing on a curve, having attained a speed of six miles per hour—within what distance by the exercise of the means that are at the disposal of the engineer can he stop that engine and cars after having received a signal.

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial and not properly framed, and assuming a state of facts not shown to exist in this case.

The COURT.—In what respect?

Mr. SEABURY.—Also on the ground that it is not properly set before the witness—the facts which have been established beyond dispute in this case. The question arises as to the time in which the signal was given and the place—this engine was not upon a curve, as I understand it at the time the signal was given—the switch constitutes the curve in question; nor does the question have anything in it—

The COURT.—Didn't the curve begin the moment the switch was struck—that is when the wheels of the engine or cars began [408] to leave the main track?

(Testimony of J. G. Lindsey.)

Mr. KIBBEY.—The curve is in the main track that I am talking about.

Mr. SEABURY.—The point of rocks is the curve I have reference to.

Mr. KIBBEY.—The question seems to be misunderstood—

The COURT.—(Examining photograph.) This looks like a straight track to me.

Mr. SEABURY.—The picture doesn't go far enough. The undisputed testimony is that there is a curve immediately at the end of that picture.

Mr. KIBBEY.—This shows the curve (exhibiting tracing to the Court).

The COURT.—Is your objection that there is no evidence that there is a curve there?

Mr. SEABURY.—No, but my objection is that the question is not sufficiently specific in that it does not state in what particular position on the curve the car was at the time the signal was given, nor does it assume to tell the witness what character of engine and what facilities existed for the stopping of it.

The COURT.—I thought those were mentioned—straight air.

Mr. KIBBEY.—The only fact I put in there that has not been proven is the weight of the engine—that is the only fact in there.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

Mr. KIBBEY.—I will add a fifteen degree curve.

Mr. SEABURY.—We object on the additional

(Testimony of J. G. Lindsey.)

ground that I am not familiar with any such evidence.

Mr. KIBBEY.—It was given by Mr. Bond.

[409] The WITNESS.—It would stop in about sixty feet.

Mr. KEARNEY.—I move to strike out the testimony of the witness as irrelevant, incompetent and not proving or tending to prove any issue in this case.

The COURT.—The motion will be denied.

Mr. SEABURY.—We except. That is all, Mr. Lindley.

(Witness excused.)

[Testimony of Ingraham T. Sparks, for Defendant.]

INGRAHAM T. SPARKS, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Give you name to the reporter, please.

A. Ingraham T. Sparks.

Q. Where do you live? A. In Phoenix.

Q. How long have you lived here?

A. About eleven years.

Q. What is your business?

A. I am a railroad conductor.

Q. What branches of railroading has your experience covered?

A. I started in when I was about fifteen, I guess, as yard clerk—from yard clerk I went to bill clerk, bookkeeper in the auditor's office, chief clerk to the General Superintendent, foreman on a track and

(Testimony of Ingraham T. Sparks.)

brakeman and conductor.

Q. What period did your experience cover as foreman on a track?

A. Just on the Arizona Eastern here. I ran a train and extra gang too at the same time. We were taking up small rail and putting down big rail—taking up forty pound and putting down sixty-two pound.

Q. Do you know anything about the operation of cars on a railroad, [410] either from experience or observation?

A. Yes, sir, I have done a good deal of switching in my life.

Q. Where?

A. Well, here—most of it here on the Arizona Eastern—the old M. & P. I have run a mixed train here for going on ten years—mixed passenger train.

Q. On different kinds of road and different kinds of cars?

A. Yes, sir, I have run on good track, bad track and all kinds of track. We haven't so many grades here, but I have been on roads—I was in Mexico on roads where we had heavy grades.

Q. Then you are familiar with the operation of trains on those different classes of grades?

A. Yes, sir.

Q. Mr. Sparks, suppose that there is a track—railway track—with a grade about eight hundred feet long between two points that I will call your attention to—that the grade from this point is down two-tenths of one per cent—

(Testimony of Ingraham T. Sparks.)

A. From the switch coming this way?

Q. Yes—two-tenths of one per cent for twenty-five feet and for seventy-five feet it is one-tenth of one per cent down—two-tenths for twenty-five feet and then for seventy-five feet additional on this track I am calling your attention to it is one-tenth of one per cent down—and for the next twenty-five feet it is twenty-eight one-hundredths per cent down and for the next fifty feet it is one-tenth of one per cent down— A. Still coming this way?

Q. Yes. Now, for the next twenty-five feet it is one-tenth of one per cent up, and the next twenty-five feet it is one-tenth of one per cent down, for the next twenty-five feet it is one-tenth of one per cent up, the next twenty-five feet it is one-tenth of [411] one per cent down, and the next twenty-five feet it is forty-eight one-hundredths of one per cent up.

A. How many feet is that all told?

Q. Three hundred feet. Now, what would be your opinion as to cars rolling on that grade of their own volition after they had been stopped?

Mr. SEABURY.—We object to the question as irrelevant and immaterial—no sufficient qualification of the witness and no sufficient framing of the hypothetical question.

The COURT.—He may answer.

Mr. SEABURY.—Exception.

The WITNESS.—That would be about seven car-lengths—three hundred feet—back from the grade. Do you mean?

Mr. McFARLAND.—I mean to say—

(Testimony of Ingraham T. Sparks.)

The COURT.—Let him ask his question.

The WITNESS.—Of course I have heard some of this evidence back there and everything. To leave the car in the clear you would have to leave it back from the frog that way fifteen or twenty feet, and that would put all those cars on the down grade away from the switch, practically. The first twenty-five feet was toward the switch—

Mr. KIBBEY.—No, that is down from the switch.

Mr. McFARLAND.—Two-tenths of one per cent or five-eighths of an inch down.

The WITNESS.—If those cars would roll at all, it would have a tendency to roll away from the switch—the grade seems to be that way—seven car-lengths down.

(By Mr. McFARLAND.)

Q. Suppose four cars loaded—approximately forty tons to the car—and left standing on that track within the points to which your attention has been called—what would you say as—without [412] brakes—what would you say as to their rolling or not rolling?

Mr. SEABURY.—We object to the question on the ground already urged.

The COURT.—I overrule the objection.

Mr. SEABURY.—Exception.

The WITNESS.—What was the question?

(By Mr. McFARLAND.)

Q. What would you say as to whether the cars would roll or not?

A. Well, cars are curious things—can't always tell.

(Testimony of Ingraham T. Sparks.)

In my experience in ten to eleven years that I have been in train service, I have had one or two cars roll on me when I would leave them, and you just can't tell what makes them roll.

Q. Would you reasonably expect cars under those conditions to roll without brakes set?

Mr. SEABURY.—We object to the question.

The COURT.—I overrule the objection.

The WITNESS.—No, unless some wind was blowing or something of that sort.

(By Mr. McFARLAND.)

Q. You would consider that a reasonably safe operation by the defendant in switching cars on that particular part of the road on the grade as shown to you?

Mr. SEABURY.—We object.

The COURT.—I sustain the objection to that.

(By Mr. McFARLAND.)

Q. Do you know the method pursued by other railroads in operating their cars in switching on grades similar to the one here described?

Mr. SEABURY.—Just answer yes or no to that.

The WITNESS.—I would have to describe a switch before I could tell.

[413] Mr. SEABURY.—I object.

(By Mr. McFARLAND.)

Q. Do you know the methods pursued by railroad companies in operating their cars on lines similar to the one here in reference to switching?

Mr. SEABURY.—We object to the question as incompetent and irrelevant and inadmissible.

(Testimony of Ingraham T. Sparks.)

The COURT.—That calls for his knowledge.

(To the witness.)

Q. Are you familiar with switching?

A. Yes, sir.

Q. Can you answer the question that was put yes or no?

A. It would be hard unless I knew what kind of a switch they are talking about. You very seldom on level track set any brakes—

Mr. SEABURY.—Wait a minute now—

The COURT.—We are getting at your ability to answer the question when it is put to you.

Mr. SEABURY.—Let him ask the question again.

(By Mr. McFARLAND.)

Q. Now, suppose it was the custom of the defendant to leave cars standing without brakes on the line of railway and on the track that has been described to you. A. Yes, sir.

Q. Is that, so far as you know, the method pursued by other railroads in the operation of their cars on similar tracks?

Mr. SEABURY.—We object to it as incompetent.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except.

(To the witness.)

Q. Would you say that the operation of its cars on that particular [414] piece of track by leaving them standing on the track without brakes was a reasonably safe operation of those trains?

Mr. SEABURY.—We object.

The COURT.—I sustain the objection.

(Testimony of Ingraham T. Sparks.)
(By Mr. McFARLAND.)

Q. Do you know as a matter of fact whether the cars left standing on that kind of a track and grade would roll or not roll without having the brakes set?

Mr. KEARNEY.—We object.

The COURT.—He may answer that question.

Mr. KEARNEY.—Exception.

The WITNESS.—I don't think it would roll.

(By Mr. McFARLAND.)

Q. I mean of their own motion—without some outside force.

A. They would have to have something to start them.

Q. Have you ever had any experience or observation in stopping trains when in motion?

A. Yes, sir.

Q. Suppose that an engine weighing approximately one hundred and twenty-four thousand pounds was attached to four loaded cars, approximately forty tons to the car—

A. That is, the load is forty tons?

Q. Yes. This engine was equipped with straight air and other appliances for use in stopping and starting the engine, and that that engine and those cars were going approximately six miles an hour on a slight curve—on a curve of fifteen degrees. In what distance would you say that the engine could be stopped—that the engineer could stop his engine and that train going approximately six miles an hour?

Mr. SEABURY.—We object to the question as incompetent and [415] not properly framed and

(Testimony of Ingraham T. Sparks.)

assuming a state of facts not properly proven.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

The WITNESS.—Well, sir, in switching—

The COURT.—Just answer the question.

The WITNESS.—Two car-lengths.

(By Mr. McFARLAND.)

Q. What would that be in feet?

A. It depends on whether they are thirty-six foot or forty foot cars.

Q. Forty foot cars.

Mr. SEABURY.—We object. There is no evidence as to the length of the cars.

The COURT.—What do you mean by cars?

The WITNESS.—If switching passenger-cars you give passenger car-lengths, if switching freight-cars you give freight-car lengths; but if they were going six miles an hour I figure about two car-lengths to stop the cars and engine going at that speed. That would be anywhere from eighty feet to seventy feet, according to the length of the cars.

(By Mr. McFARLAND.)

Q. Then your opinion is that the cars can be stopped in eighty feet from the time he got the signal?

Mr. SEABURY.—We object.

The COURT.—I overrule the objection.

The WITNESS.—Yes, sir, at six miles an hour. It is surprising how quick a train can stop.

(By Mr. McFARLAND.)

Q. What is the usual distance that a signal is given

(Testimony of Ingraham T. Sparks.)

in order [416] to stop a train of cars when switching in the yards?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial, not having any bearing on this case.

The COURT.—I think that is cross-examination.

Mr. McFARLAND.—Is the objection sustained?

The COURT.—Yes, on that ground.

(By Mr. McFARLAND.)

Q. Is there any usual distance that brakemen give signals before they desire to have a train stop?

Mr. SEABURY.—We make the same objection.

The COURT.—I think that is cross-examination—he has stated his opinion.

Mr. McFARLAND.—That is all.

Cross-examination.

(By Mr. SEABURY.)

Q. Have you ever operated an engine as engineer?

A. I have helped out some time if the engineer would want to go back to get a drink of water or something like that, out on the Chandler branch, something like that—switchman or engineer would want to go and get a cup of coffee, I would help out.

Q. Did you ever test an engine to find out in what time you could stop it?

A. I have made enough switches to know.

Q. You have? A. Yes, sir.

Q. Do you know anything about the kind of engine that was involved in this case?

A. From what I hear them talk—it was a goat, or switch engine.

(Testimony of Ingraham T. Sparks.)

Q. Is that all you know about the kind of engine involved in [417] this case?

Q. Generally all goats and switch engines are alike —all similar.

Q. They are?

A. All that I have ever seen—the way they speak of them.

Q. Don't the appliances differ?

A. Some have straight air and some haven't straight air—different kinds of airs—there is all kinds of things, you know.

Q. Is that the only difference that would exist with reference to it?

A. With standard switch engines?

Q. Yes.

A. They are all just alike. If you see one you see them all.

Q. Practically know them all?

A. Practically all alike. Of course there is exceptions to all cases.

Q. Now, the promptness with which a switch engine might be stopped would that depend at all upon the degree of steam they had on that car at that time—on the engine—the amount of steam power?

A. When a man applies his air he generally shuts off his steam if he is going to stop.

Q. But the grade would have something to do with the promptness in which he could stop the car?

A. Yes, sir.

Q. And whether it was on a curve or not?

A. Cars bind a little more on a curve than on straight track.

(Testimony of Ingraham T. Sparks.)

Q. The weight of the load would affect it?

A. Loads pull a little harder on a curve than on a straight track.

[418] Q. Do you know anything about the usual weight of switch engines used as in this case?

A. Switch engines?

Q. Yes.

A. I couldn't say. Some are heavier and some are lighter. What is the weight of this engine?

Q. I don't know, I am asking you. They do differ, do they? A. Yes, sir, they differ some.

Q. What do you think is the usual weight of such an engine—do you know at all?

A. I couldn't say—some go as high as one hundred and eighty thousand pounds. The engine always has the weight marked right back of the tender.

Q. You frequently notice those in other cases?

A. No, sir; don't pay much attention to it when working with an engine—just happen to glance at it.

Q. You don't know any of the men involved in this occasion? A. No, sir.

Q. You don't know anything about it at all?

A. I know just what I have heard.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of Paul Reissinger, for Defendant.]

PAUL REISSINGER, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

(Testimony of Paul Reissinger.)

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your name?

A. Paul Reissinger.

Q. Where do you live?

A. Clifton, Arizona.

[419] Q. How long have you lived there?

A. Between six and seven years.

Q. What is your business?

A. Railroad superintendent at present.

Q. How long have you been railroading?

A. Thirteen years.

Q. Now, what experience does that cover—that time?

A. Location and railroad construction and track work—maintenance of track and supervision over the keeping it up—and in some cases actual work itself in its various branches.

Q. Were you ever connected with any other railroad? A. Yes, sir.

Q. What ones?

A. The Victoria, Vancouver and Eastern on construction, and the Great Northern Railroad in maintenance and construction and location also—and the Montana Central—those roads all belong to the same road—they are all great Northern—they weren't at that time, however.

Q. What position do you now hold with the defendant company? A. Railroad superintendent.

Q. How long have you been in that position?

A. It is three years the first of last August.

(Testimony of Paul Reissinger.)

Q. Were you in that position on the 15th of March, 1911? A. I was.

Q. What are the duties connected with that office, particularly with reference to track and the operation of trains.

A. I have general supervision over the operation of the entire road.

Q. Do you know Thomas P. Clark? A. I do.

Q. How long have you known him?

[420] A. Well, he was one of our engineers before I was made superintendent. I knew who he was before that time, off and on. He was there when I came.

Q. What position did he occupy on the 15th of March, 1911?

A. He was engineer on our switch engine.

Q. On the particular switch engine that has been described here? A. I believe so; yes.

Q. Can you describe that engine?

A. That is a six-wheel switching engine with all the weight of the engine proper on the drivers.

Q. What weight do you mean by weight on the drivers?

A. The entire weight of the engine itself, without the tender, it is on the drivers in order to give it more adhesion.

Q. The entire weight?

A. Of the engine proper—on the drivers.

Q. How much is that weight, do you know?

A. It is about one hundred and twenty-four thousand pounds, under normal conditions.

(Testimony of Paul Reissinger.)

Q. About one hundred and twenty-four thousand pounds? A. Yes.

Q. Is it what is commonly called a goat engine in railroad parlance?

A. It is generally known as a goat; yes.

Q. How is it equipped with reference to brakes?

A. It has the automatic air brakes on it and the straight air.

Q. Both? A. Both.

Q. Are you familiar with the track of the defendant railroad between what is known as the Shannon switch and the San Francisco railroad bridge?

A. Yes, sir.

[421] Were you familiar with that track on March March 15th, 1911? A. Yes, sir.

Q. Do you know its condition then?

A. Yes, sir.

Q. What was its condition on March 15th, 1911, compared with its condition three weeks later at the time Mr. Bond made this survey?

A. There had been no change whatever—unless it was what little change would be made by the track having been pounded down a little more by the extra traffic that ran over it.

Q. Practically, was any work done on that track?

A. Not a particle, to amount to anything.

Q. For three weeks subsequent to the 15th day of March to the time this survey was made?

A. How much change do you mean?

Q. Well, was there any different grade of that road three weeks later than it was on the 15th day

(Testimony of Paul Reissinger.)

of March? A. No, sir.

Mr. SEABURY.—I ask that the witness be permitted to state if there was any work on the road.

The COURT.—I think that is unnecessary indirect in a case of this sort. I think the superintendent can say whether it is substantially the same or not.

(By Mr. McFARLAND.)

Q. Was it the same three weeks later as it was on the 15th day of March? A. Substantially so.

Q. Was there any change in the grade of the road in that time? A. Not in that time; no, sir.

Q. Now, do you remember when you put that block signal in? A. Yes, sir.

[422] Q. Do you know the condition of that roadbed at that time?

A. Well, only in this way, that there had not been any work done down there.

Q. How often were you over that roadbed from the 15th of March up to the day you put the block signal in? A. Four times a day at the least.

Q. If there was any work being done on that road you would know it, wouldn't you?

A. Yes, sir. I might explain that when I say four times a day, I walked that track to and from the office and my house every day.

Q. Both going and coming? A. Yes, sir.

Q. Are you there other times than that?

A. Every few days—not every day, though.

Q. To what extent, if any, was the grade of that road between the Shannon switch and the bridge changed when you put that block signal in?

(Testimony of Paul Reissinger.)

The COURT.—How is that material, Judge?

Mr. McFARLAND.—This man testified that he raised the roadbed for the block signal a foot.

(To the witness.)

Q. What change of grade was made, if any, at the point of the switch at the time the block signal was put in? A. Practically none.

Q. Now, do you know Parker? A. Yes, sir.

Q. Was he at work about that time on that grade?

A. Yes, sir.

Q. Did his work there practically change the grade of the road? A. Very slightly.

[423] Q. Now, do you know what he did do there?

A. Yes, sir, I do, because he did it under my orders.

Q. Under your supervision? A. Yes, sir.

Q. Well, what did he do?

A. Previous to the time the block signals were put in there the dirt between the ties was up level with and above the tops of the ties, but in order to make the block signal work effectively this dirt had to be dug down below the tops of the ties in some places two or three inches. That was all dug out by my instructions and filled out towards the ends of the ties. In some cases he may have raised the track two or three inches and put a little dirt under some ties that were down and needed tamping up—that in spots would raise that track at the time it was done perhaps two inches—no more—and that has since been pounded down by the traffic over it so the grade is practically where it was before.

(Testimony of Paul Reissinger.)

Q. On March 15th? A. Yes.

Q. So you would say now that the grade of that road is practically the same as it was on March 15th, 1911? A. I think so; yes, sir.

Q. As a matter of fact was that grade ever raised a foot at that point?

A. It couldn't have been without my knowing something about it.

Q. And you say it was not?

A. It was not, no, sir.

Q. Did you see Mr. Clark at the date of the accident? A. I did not; no, sir.

Q. Did you see him afterwards?

A. Not until he was out of the house and able to get around.

[424] Q. Did you have any conversation with him?

A. I went up to him the first time I saw him when he was out and shook hands with him and asked him how he was getting along.

Q. How long was that after the accident, if you can remember?

A. I can't give you the actual lapse of time, but I think it was within two or three days of the first time he came up town, for it was the first time I had seen him and I had heard he was out, and I was looking for him.

Q. Was that before or after he went to El Paso?

A. I don't know about that—I don't know the time he went to El Paso.

(Testimony of Paul Reissinger.)

Q. Would you say it was a month after the accident?

A. A month or thereabouts, I should judge.

Mr. SEABURY.—That is after the accident?

The WITNESS.—After the accident.

(By Mr. McFARLAND.)

Q. But it might have been a little more. Did you have any conversation with him?

Q. I talked with him two or three minutes.

Q. What did you say and what did he say?

A. As it was the first time I had seen him I asked him about his accident—how badly he was hurt. It is pretty hard to report a conversation word for word at this length of time, but I think—I am quite sure—he told me that he had had two or more ribs broken—I have forgotten just how many—seems to me it was two—and that he had hurt his hip, and as I remember at that time—I can't remember the exact words he used, but I know my general impression was that he was feeling as if he had gotten off pretty light, and I asked him, as I naturally would, when he expected to be ready to go back to work, and he said he wasn't ready then but expected to be in a short time.

[425] Q. So far as your memory serves you, those are the only complaints he made about his injuries at that time?

A. I don't remember of any others, no.

Mr. SEABURY.—We move to strike out that portion of the witness' answer in which he says so far as he recalls the impression he got was that Mr.

(Testimony of Paul Reissinger.)

Clark said he got off pretty light. It doesn't purport to give the conversation.

The COURT.—That is a matter for cross-examination, I think.

(By Mr. McFARLAND.)

Q. Was anything said by Mr. Clark about his eye?

A. No, sir.

Q. Did he say anything about his head?

A. No, sir. I will say he did not; I would have remembered that if he had.

Q. You have had experience, you say, in the operation of trains in switching and on the main line—in the operation or observation?

A. I have had supervision of it a good many times before I came with this road and after.

Q. Do you know the grade of the track between the Shannon switch and the San Francisco bridge?

A. I know it in this way: We have the profiles made of it—of course I take these grades from the profiles.

Q. What would you say as to cars rolling if left on that part of the track between Shannon switch and the San Francisco bridge? That is, without brakes being set.

Mr. SEABURY.—We object. The witness' only knowledge of the grade is stated to be profiles which are not before the court.

The COURT.—Objected is overruled.

Mr. SEABURY.—We except.

The WITNESS.—They would not ordinarily roll.

(By Mr. McFARLAND.)

[426] Would you expect that cars would roll

(Testimony of Paul Reissinger.)

leaving them on that roadbed and on that grade?

Mr. SEABURY.—We object to it as improper and not admissible and incompetent—the witness' expectations not affecting the issue before the court.

The COURT.—I think he has already answered that question—would not ordinarily roll. I presume if that is true they would not be expected to roll.

(By Mr. McFARLAND.)

Q. Do you know anything about the operations of cars and engines in switching?

A. I have done it to some extent.

Q. Suppose that an engine weighing approximately 124,000 pounds—

The COURT.—He knows this engine, doesn't he? Why not ask him about an engine similar in character to it?

(By Mr. McFARLAND.)

Q. Suppose that an engine similar in character to the switch engine there in the yards of the defendant and used by the defendant in switching, attached to four cars loaded weighing approximately forty tons to the car, going on the track with a fifteen degree curve, going approximately at the rate of six miles per hour, what would you say would be the distance that that train and engine could be stopped?

Mr. SEABURY.—We object to the question on the ground already urged to the previous hypothetical questions.

The COURT.—I overrule *to* objection.

Mr. SEABURY.—We except.

(Testimony of Paul Reissinger.)

The WITNESS.—I think that string ought to be stopped in about one hundred feet—I think it could be.

(By Mr. McFARLAND.)

Q. Equipped as this engine was?

[427] A. Yes; if every precaution was taken and everything possible was done to stop it.

Q. Then an engineer getting a signal with a train of that kind on a grade of that kind and a track of that kind, you think it could be stopped within a hundred feet?

The COURT.—He has already said so.

(By Mr. McFARLAND.)

Q. Is there any difference in the time a train can be stopped on a curve and on a straight track?

A. Yes, indeed.

Q. Which would be the quickest?

A. You can stop quicker on a curve than on a piece of straight track provided the engineer will not always take as many chances on a piece of curved track as he would on a piece of straight track.

Mr. McFARLAND.—That is all.

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Reissinger, do you know the rate of speed necessary to ascend the Shannon switch with freight-cars such as were attached to that engine on March 15th, 1911? A. About, yes, sir.

Q. About what would be your opinion?

A. I should say they should be running between ten and twelve miles an hour.

(Testimony of Paul Reissinger.)

Q. You think one of those goat engines which you have described attached to the four freight-cars you have described could ascend the Shannon hill at less speed than ten or twelve miles an hour?

A. Yes, they can, because they do do it.

Q. They do? A. Yes.

Q. But I understand ten or twelve miles an hour would be the [428] usual rate of speed—

Mr. KIBBEY.—We object to the question as not proper cross-examination in the first place.

The COURT.—It is not cross-examination.

Mr. SEABURY.—I withdraw it.

(To the witness.)

Q. Now, you told us something about a block signal installed in this track. Whereabouts was it installed?

A. Between the south switch of the Clifton yard and the north switch of the Hill's flat yard.

Q. So that it covers the track, did it not, between the railroad crossing and the Shannon switch?

A. Yes, sir.

Q. What did you put that block signal in there for?

A. There was a number of years ago—I think in 1907—there was a collision—there are two curves, rather sharp, on this piece of track—there was a collision between a string of cars and an incoming freight train, and twice during the previous year that there had been very close calls to having collisions around those curves, and we put those block signals in there for the purpose of avoiding any dan-

(Testimony of Paul Reissinger.)
ger of any collision.

Q. Were those close calls you speak of—one collision—prior to March, 1911? A. Yes, sir.

Q. And when did you tell us the block signal was put in? A. In June.

Q. 1911?

A. 1911. We started to put it in in that month.

Q. So, as a matter of fact, you began to put it in shortly after the occurrence of this accident at that same place, did you not?

[429] A. Yes, but the material had been ordered before the accident. It takes some time to get that stuff—six months about.

Q. Who ordered the material?

A. I think Mr. Thompson was purchasing agent at that time.

Q. He was?

A. I think so, if I remember rightly.

Q. Isn't it a fact that Mr. Thompson, or those in charge of the operation of the road, knew prior to March 15th, 1911, that the track was then in a dangerous condition because of the lack of a block signal? A. No, sir.

Mr. KIBBEY.—We object to his pursuing that further. It has nothing whatever to do in this case.
(By Mr. SEABURY.)

Q. You knew that portion of the track from the switch was downgrade?

A. It was not what I would call an appreciable grade at all there.

Q. It was not?

(Testimony of Paul Reissinger.)

A. Not so far as an operating standpoint is concerned.

Q. You knew it was some downgrade?

A. It is up and down a little—what you would expect from track that has not been surfaced recently.

Q. Yet it is on the main line?

A. It is on the main line.

Q. And you say between the crossing and the switch it goes both up and down?

A. Both up and down—very little, though.

Q. You know Mr. Bond, don't you?

A. Yes, sir.

Q. Do you know what Mr. Bond's measurements show with reference [430] to that road?

A. Oh, I remember what the profile was.

Q. Do you know Mr. Morton, a civil engineer?

A. Yes, sir.

Q. Have you worked with him?

A. I never have.

Q. Have you seen any of his work? A. Yes.

Q. Do you know whether or not he is a competent engineer?

Mr. KIBBEY.—We object to the question. We haven't objected to the competency of Mr. Morton.

The COURT.—I sustain the objection.

By Mr. SEABURY.—I would be glad if your Honor would allow me to conclude after luncheon—we are about to adjourn.

The COURT.—Very well.

Mr. McFARLAND.—Before we adjourn, would

(Testimony of Paul Reissinger.)

one witness be permitted to correct his testimony in one respect?

The COURT.—Who is it?

Mr. McFARLAND.—Mr. Bond.

The COURT.—If he is here.

Thereupon the witness Reissinger leaves the stand.

[Testimony of R. C. Bond, for Defendant (Recalled).]

R. C. BOND, being recalled as a witness on behalf of the defendant and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. McFARLAND.)

Q. Mr. Bond, you testified yesterday that the width of that cab was ten feet six inches.

A. Yes, sir.

Q. What is it—were you mistaken in that?

A. Yes, sir.

Q. What is it? [431] A. Ten feet one.

Mr. McFARLAND.—That is all.

(Witness excused.)

The COURT.—We will take a recess until half-past one o'clock, and the jury will bear in mind not to talk about this case or to let anyone talk to you about it. Come back at half-past one.

Thereupon the court takes a recess.

At one-thirty P. M. this day, the plaintiff being present in person and represented by his counsel, and the defendant being present by its attorneys, the jurors come into court and are called by the Clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

[Testimony of Paul Reissinger, for Defendant (Recalled).]

PAUL REISSINGER, the witness under examination before the noon recess, again takes the stand, and having been heretofore duly sworn in this case, testifies further as follows:

Mr. SEABURY.—We have no further cross-examination.

Redirect Examination.

(By Mr. McFARLAND.)

Q. What part of the defendant's roadbed was that block signal intended to prevent accidents in the operation of its trains?

A. On the curve between the Shannon switch and the south end of the Clifton yard, mainly.

Q. How far would that be north of the Shannon switch?

A. Three or four hundred feet, is the most dangerous part.

Q. Was it the intention of that block signal to prevent accidents in the switching of cars from the main line up the Shannon switch?

Mr. SEABURY.—We object to the intention with which the signal was placed there.

Mr. McFARLAND.—I will substitute the word purpose.

[432] Mr. SEABURY.—We make the same objection.

The COURT.—He may answer.

Mr. SEABURY.—We except.

The WITNESS.—The block signal was not put in

(Testimony of Paul Reissinger.)
on that account at all.
(By Mr. McFARLAND.)
Q. Explain to the jury what the block signal is.
Mr. SEABURY.—We object to the question as not proper redirect.
The COURT.—Is this something you omitted to call out before?
Mr. McFARLAND.—It is something that they brought out—the inference that this block signal was put in in reference to this accident.
The COURT.—Your purpose is to negative the inference that this accident had something to do with the installation of the block signal?
Mr. McFARLAND.—Yes, sir.
The COURT.—I understood him to say—understood that he had already answered it.
Mr. KIBBEY.—We would like to have the jury know what the block signal is.
The COURT.—He may do so.
Mr. SEABURY.—We except.
The WITNESS.—This is an automatic block signal that is operated by trains passing over the block district—they make an electric connection between the two rails and throw the semaphore arm which is on a mast at either end of the block district.
(By Mr. KIBBEY.)
Q. Where are those semaphores?
A. The first semaphore on the Clifton end is at the south end of the Clifton yard.
Q. Within sight of the point of this switch?
[433] A. Of which switch?

(Testimony of Paul Reissinger.)

Q. The Shannon switch.

Q. The Shannon switch? A. No, sir.

Q. It couldn't be seen from there? A. No, sir.

Q. Why? A. It is around a curve.

Q. Where is the other semaphore?

A. The other is almost directly in front of Gatti's butcher-shop which is around just about six hundred feet below the Shannon switch.

Q. What operates those semaphores?

A. They are equipped with batteries which furnish the electric current, and then there is a dynamo on each signal.

Q. They are electrically operated by cars running over the track?

A. Yes, sir. The cars break the current.

Q. With cars standing at that switch, would it operate either of the semaphores so the engineer could see them?

A. It would operate both the semaphores, but the engineer could only see the one at the south end which would indicate nothing to them.

Q. It would indicate nothing at all? A. No, sir.

(By Mr. McFARLAND.)

Q. Would that block signal indicate that there was a train between the two points?

A. Yes, but his own train would throw it in that position, so it wouldn't indicate anything to them.

Q. If he was operating the train between those two points he would know he was on the track himself?

A. Yes, sir.

Q. I understand you that it has nothing to do

(Testimony of Paul Reissinger.)

with switching [434] operations of cars at that point?

A. Not a thing. He was down there and if he had paid any attention to the blocks it would have misled him.

Q. What is that?

A. Anybody would be foolish to pay any attention to those blocks in his position, for it would not indicate whether a train was following or not—it was simply operated by his own train.

(Witness excused.)

[Testimony of E. Dawson, for Defendant.]

E. DAWSON, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Where do you live?

A. Clifton, Arizona.

Q. Give your name first. A. E. Dawson.

Q. How long have you lived in Clifton, Arizona?

A. Four years and two months.

Q. Are you in the employ of the defendant railroad company? A. Yes, sir.

Q. How long have you been in its employ?

F. Four years and two months.

Q. In what capacity?

A. As master mechanic.

Q. Do you know Mr. Clark? A. Yes, sir.

Q. How long have you known him?

A. The same length of time—four years and two months.

(Testimony of E. Dawson.)

Q. Did you see this accident? A. No, sir.

[435] Subsequent to that accident did you have any talk with Mr. Clark? Did you see him?

A. A few days after the accident I did, but I don't know how many days.

Q. Where was he when you saw him?

A. In bed at home.

Q. Were you talking about the accident?

A. Our conversation was principally on the injuries received by him.

Q. What did he say?

A. He complained of his ribs and his hip, saying how sore it was and at times how badly it would hurt him.

Q. Any other injuries except the ribs?

A. No other injuries that I can remember at all.

Q. About how long did you say that was after the accident?

A. As near as I can remember, it would be three or four days after.

Q. At his house? A. Yes, sir.

Q. You say he was in bed? A. In bed.

Q. Was anybody there at that time except you and Mr. Clark?

A. I believe Mrs. Dawson was there, my wife and I, and I believe the nurse.

Q. Now, that is the extent, so far as you remember, of his complaint as to his injuries? A. Yes, sir.

Q. His ribs? A. His ribs and hips.

Q. Did he say anything about any injury to his head? A. No, sir.

(Testimony of E. Dawson.)

[436] Q. Did he say anything about any injury to his eye? A. No, sir.

Q. Did you see any evidence on his face of any injury or violence?

Mr. SEABURY.—We object to that as a conclusion—any evidence of it.

(By Mr. McFARLAND.)

Q. What was the condition of his face when you saw him?

A. The usual appearance except that he had a distressed and pale appearance from his injuries.

Q. Did you notice any scratches or bruises on his face? A. No, sir.

Q. Did he make any complaint to you about his eyes?

Mr. KEARNEY.—We object to the question as leading.

The COURT.—It is leading.

(By Mr. McFARLAND.)

Q. What did he say, if anything, about his eye?

A. Nothing whatever.

Q. What experience, if any, have you had in railroading or in the railroad business?

A. I have been in the employ of railroads about twenty-three years. My total experience in mechanical work is over thirty-six years, but about between twenty-one and twenty-three in connection with the operation of trains through the mechanical department.

Q. Have you any knowledge or experience in the operation of trains on lines of road?

(Testimony of E. Dawson.)

A. Well, as far as the maintenance of locomotives and cars and the handling of them from a mechanical standpoint.

Q. Do you know that part of the defendant's railway running from the Shannon switch to the bridge over the San Francisco river?

[437] A. I am familiar from observation only, having passed over it many times.

Q. I understand you to say you are familiar with the operation of trains on railroads? A. Yes, sir.

Q. From that experience and observation what would you say about cars rolling on that particular part of the roadbed that you have desscribed, without the brakes being set?

Mr. SEABURY.—We object—too vague and indefinite to allow the witness to do anything except make a general discussion of rolling cars. The question is what would you say as to their rolling.

The COURT.—I presume he means whether in his opinion the cars would roll or not.

Mr. SEABURY.—I suppose that is what was intended, and if that is so we object to it on the ground that the undisputed evidence in the case is that cars that were without any brake or block did in fact roll.

The COURT.—You are not attempting to show that they would not roll?

Mr. McFARLAND.—Whether they would or would not roll if left on that part of the track from the Shannon switch to the bridge without the brakes being set.

Mr. SEABURY.—The undisputed evidence is

(Testimony of E. Dawson.)
that they have on a variety of occasions.

Mr. KIBBEY.—Not in a variety of cases.

The COURT.—I don't understand they are attempting to show they did not roll in this instance.

Mr. KIBBEY.—No, whether they probably would roll or not.

The COURT.—I presume you are trying to show by this witness what you showed by another witness—the probability of their [438] rolling?

Mr. KIBBEY.—Yes.

Mr. SEABURY.—We think it is objectionable.

The COURT.—He may answer that question.

Mr. SEABURY.—We except.

The WITNESS.—Part of my duties was to investigate that case.

Mr. McFARLAND.—Please answer the question.

The WITNESS.—Please repeat it.

(By Mr. McFARLAND.)

Q. Whether they would probably roll there if left standing still—of their own motion or volition.

A. From observations that I took—

The COURT.—Just please answer the question. Just say would they or would they not.

The WITNESS.—I think not.

(By Mr. McFARLAND.)

Q. Why do you think so?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. McFARLAND.)

Q. Do you know the amount of force it would require to move a loaded car of approximately forty

(Testimony of E. Dawson.)

tons on a level track?

Mr. SEABURY.—We object to the question as assuming a state of facts that has no relation to this case.

The COURT.—It is a scientific inquiry—not a hypothetical question necessarily. You may answer the question.

Mr. SEABURY.—We except.

The WITNESS.—Does that mean to keep it in motion or to start it from a standstill?

Mr. McFARLAND.—To start it from a standstill.

The WITNESS.—Forty tons could be started with a power of [439] six hundred and eighty pounds, or about seventeen pounds to the ton—probably a little over that, but that is a safe figure. Some run it eighteen.

Q. Now, what amount of force or power would it require to start a car standing still loaded approximately with forty tons of freight on a grade of one-quarter of one per cent?

Mr. SEABURY.—We made the same objection.

The COURT.—Objection is overruled.

Mr. SEABURY.—Exception.

The WITNESS.—Is that one-quarter of one per cent up grade or down?

Mr. McFARLAND.—Well, down.

The WITNESS.—I will have to figure that. (Witness figures.) Was forty tons the total weight?

Mr. McFARLAND.—Yes.

The WITNESS.—(After concluding calculations.) Four cars of forty tons each from a stand-

(Testimony of E. Dawson.)

still down a one-quarter of one per cent grade would take nineteen hundred and twenty pounds.

(By Mr. McFARLAND.)

Q. To move it down-grade?

A. Yes—on a perfect track.

Q. Now, on a track that was down-grade one-quarter of one per cent? A. That is the answer.

Q. How much?

A. Nineteen hundred and twenty pounds.

Q. To the ton? A. No, to the total load.

Q. To the total four loads?

A. Yes, sir. I have the weight of those cars that were in this accident.

[440] Q. What is the weight?

A. The total weight of the four cars was three hundred and seventy-five thousand nine hundred pounds, or one hundred and eighty-seven tons and ninety-five one-hundredths.

Q. What would that be to the car?

A. An average of—

Mr. SEABURY.—Now, we object to the witness reading from a memorandum-book—there is no question about refreshment of the recollection—simply reading out of a memorandum-book. That doesn't constitute evidence. We ask that his answer be stricken out as appearing that he is reading from a memorandum-book.

The COURT.—Strictly speaking that objection is good.

(By Mr. McFARLAND.)

Q. Can you state that fact from your memory?

(Testimony of E. Dawson.)

A. I took those figures from the record in the superintendent's office given in there by the conductor the day previous to the wreck—the conductor on the train that brought these cars in.

Mr. SEABURY.—We move that it be stricken out on the ground that the evidence is only hearsay and as such inadmissible.

The COURT.—Oh, yes, but I doubt—the cars must have weighed something—probably approximately that. What difference does it make whether a few more pounds more or less?

Mr. SEABURY.—I don't suppose there is any objection, your Honor.

The COURT.—Yet the objection is technically good.

Mr. McFARLAND.—The answer may stand.

The COURT.—Yes.

(By Mr. McFARLAND.)

Q. Do you know the method adopted by standard railway companies [441] in switching cars in their yards?

Mr. SEABURY.—We object to the question as immaterial whether he knows or not.

The COURT.—The question is sustained to that.

(By Mr. McFARLAND.)

Q. Do you know the methods pursued by standard railway companies in leaving cars standing upon their tracks? A. Yes, sir.

Mr. SEABURY.—We make the same objection—immaterial whether he knows such fact or not, ask that the answer be stricken out.

(Testimony of E. Dawson.)

The COURT.—The purpose is to show the same thing?

Mr. McFARLAND.—The purpose is to show the methods adopted by railroads generally in leaving cars standing upon tracks with the brakes set or not.

The COURT.—I sustain the objection.

(By Mr. McFARLAND.)

Q. Do you know as a matter of fact whether standard railway companies leave their cars in their switching operations without brakes being set on their line of railway where the grade is one-quarter of one per cent or less?

Mr. SEABURY.—We make the same objection.

The COURT.—The same ruling.

(By Mr. McFARLAND.)

Q. Do you know whether it would be the reasonably safe operation of the defendant in the operation of the defendants' cars and switching on its lines of railway between the Shannon switch and the San Francisco bridge to leave cars on that line without brakes being set?

Mr. SEABURY.—We make the same objection.

The COURT.—The same ruling.

Mr. McFARLAND.—Mr. Reporter please note our exceptions to [442] each one of those rulings.

(To the witness.)

Q. Do you know on what grade four cars loaded approximately with forty tons of merchandise would stand after having been brought to a full stop without the brakes being set?

A. They will stand on a grade as high as—just

(Testimony of E. Dawson.)

barely one and a quarter per cent on perfect track.

Q. One and one-quarter per cent? A. Yes, sir.

(By Mr. KIBBEY.)

Q. You examined those cars involved in that accident? A. Yes, sir.

Q. What is the width of that car that came in collision with the cab?

A. It would be about nine feet nine or eight—that is the general—

Mr. KIBBEY.—You have answered.

Mr. SEABURY.—Did you measure that particular car?

The WITNESS.—No, sir.

Mr. KIBBEY.—That is your information as to the width of that car?

The WITNESS.—Yes, sir.

Mr. McFARLAND.—You didn't measure it?

The WITNESS.—No, sir.

Mr. McFARLAND.—That is all.

(Witness excused.)

Mr. KIBBEY.—We would like to recall Mr. Bond for one question.

The COURT.—Very well.

[Testimony of R. C. Bond, for Defendant (Recalled).]

R. C. BOND, being recalled as a witness in behalf of the defendant and having been heretofore duly sworn in this case, testifies further as follows:

[443] (By Mr. KIBBEY.)

Q. Mr. Bond, assuming that the cab of that engine was ten feet one inch wide, and the car with which it

(Testimony of R. C. Bond.)
came into collision is nine feet six inches wide, at what distance from the frog must the *collision occurred?*

Mr. SEABURY.—We object to the question as incompetent, not being a proper subject for expert testimony.

The COURT.—I don't see clearly how that may be.

Mr. KIBBEY.—It is a matter that your Honor can figure—it is a matter that any of the jury can figure if you are expert enough on figuring—a mere matter of calculation. Here is what I am trying to show—those cars wouldn't have collided on the frog.

The COURT.—Of course, if the two tracks were sufficiently far apart they never would collide.

Mr. KIBBEY.—But if operated at an angle to each other, now, there was some distance at which that angle there—that they would come into collision on account of the overhang of the car. I want him simply to give me that figure. It is a mere mathematical proposition. They couldn't collide on the frog.

The COURT.—They could collide, but they couldn't collide in the manner these did. They might collide end to end.

Mr. KIBBEY.—Yes, but not as in this case. It is a mere matter of computation.

The COURT.—Can't it be calculated mathematically?

Mr. SEABURY.—I don't see what we need an expert for. The undisputed evidence is that they did collide.

The COURT.—The question is how far that engine moved after the signal was given. It is proper

(Testimony of R. C. Bond.)

to show where the collision occurred. I think though that there is direct testimony on that subject. However, you may answer the question.

[444] Mr. SEABURY.—We except to the ruling of the Court.

(By Mr. KIBBEY.)

Q. How far, Mr. Bond? A. Forty-six feet.

Q. In what direction from the frog?

A. South from the frog.

Mr. KIBBEY.—That is all.

(Witness excused.)

[445] Mr. McFARLAND.—If the Court please, we offer the deposition of Dr. Dietrich.

Mr. SEABURY.—We object to the offer in gross. This deposition was taken under a stipulation which expressly reserved all objections to the questions and answers the same as if the witness were personally present.

The COURT.—Who is Dr. Dietrich?

Mr. SEABURY.—He was the attending physician.

The COURT.—On what do you base your objection?

Mr. SEABURY.—We object to the offer in gross on the ground that the deposition was taken under stipulation and not in the usual course, and that the stipulation expressly reserved—

The COURT.—I understand, but what do you wish to object to now?

Mr. SEABURY.—We wish them to read such portions of it as they desire.

The COURT.—I thought that you objected to it in gross.

Mr. SEABURY.—I only objected to the offer in gross, if your Honor please.

The COURT.—Oh, very well.

[Deposition of Dr. Henry Dietrich, for Defendant.]

Thereupon defendant's counsel reads from the deposition of Dr. Dietrich, reading the interrogatories and answers from number one to number nine, inclusive, without objection on the part of plaintiff's counsel, as follows:

Q. 1. What is your full name?

[446] A. Henry Dietrich.

Q. 2. What is your business?

A. Physician and surgeon.

Q. 3. If you say physician and surgeon, please state how long you have been in the practice of medicine and surgery and what place you have practiced your profession.

A. Since 1898. Chicago, 1898–1900; Wardner, Idaho, 1900–1902; Morenci, Arizona, 1902–1906; Clifton, Arizona, 1906–1911.

Q. 4. State what medical college or colleges you attended and if you have diplomas from same.

A. Northwestern University Medical College, and Rush Medical College, Chicago; Diploma from Rush Medical College and Presbyterian Hospital, Chicago; Post-graduate study, Berne, Switzerland, 1906.

Q. 5. What experience have you had in surgery and at what place?

A. House physician and surgeon, Presbyterian

(Deposition of Dr. Henry Dietrich.)

Hospital, Chicago, 1898–1900; assistant surgeon, Warden Hospital, Wardner, Idaho, 1900–1902, surgeon Longfellow Hospital, Morenci, Arizona, 1902–1906; chief surgeon Clifton Accident Benevolent Association Hospital, 1906–1911.

Q. 6. State the time covered in each place and the class or classes of cases in which you have had surgical experience.

A. Time as given under interrogatory 5. My experience covered the field of general surgery; it was not limited to any class of cases.

[447] Q. 7. Did you ever reside in the town of Clifton, Greenlee County, (formerly Graham), State of Arizona? A. Yes.

Q. 8. If you say you did, state the time covered by this residence. A. 1906–1911.

Q. 9. If you say that you did at one time live in Clifton, state if you can, the time that you left and where you have been since and what has been your business since you left.

A. I left in August, 1911. Went to Chicago and sailed for Europe in September, 1911. From October 1 to March 30, resided at Berlin, Germany, and from April 1st to date at Zurich, Switzerland. In both places I have been doing post-graduate medical work, principally on diseases of children.

Q. 10. State the object of your leaving, what you have been doing since you left and what you are now doing.

Mr. SEABURY.—We object to the statement of the object, although I don't think that it is material.

(Deposition of Dr. Henry Dietrich.)

The COURT.—You may read the answer.

A. To do post-graduate medical work. I have been working in hospitals and am now doing so.

Q. 11. State when you will return.

A. I do not know.

Q. 12. If you say that you will return, at what place do you expect to locate?

A. I have not chosen a location. Some large city.

[448] Q. 13. State whether you were ever connected in any capacity with the Arizona and New Mexico Railway Company, whose principal place of business is in Clifton, Arizona. A. Yes.

Q. 14. If you say that you were connected with this company, state in what capacity.

A. Chief surgeon of medical department.

Q. 15. If you say with the medical department of this railway company, please state what position you occupied in the medical department and how long.

A. Chief surgeon since 1906.

Q. 16. If you say that your position was that of chief surgeon with this company, state when this relation commenced and how long it existed.

A. From 1906 until August 1st, 1911.

Q. 17. Do you know one Thomas P. Clark?

A. Yes.

Q. 18. If you say that you do, state how long you have known him, what position if any he occupied in the service of the Arizona and New Mexico Railway Company.

A. Since 1906. Locomotive engineer.

Q. 19. If you know, please state how long he was

(Deposition of Dr. Henry Dietrich.)

in the service of the company and in what position.

A. I cannot state the exact number of years he was employed.

Q. 20. If you say in answer that you do know Mr. Clark, and that he occupied the position of engineer in this company, [449] state how long he was in this service as engineer.

A. I cannot say how long he was employed as engineer.

Q. 21. Do you know anything of an accident to Mr. Clark on or about the 15th day of March, 1911?

A. Yes.

Q. 22. If you say that you do, please state whether or not you saw Mr. Clark on that date, if not on that date, state when you first saw him after the accident.

A. I am under the impression it was Thursday, March 16th. I saw him on the day of the accident about 10 o'clock A. M.

Q. 23. If you say that you did see him on the date of the accident or some date subsequent thereto, please state whether you examined Mr. Clark with reference to any injury he received on that occasion.

A. I did.

Q. 24. Describe particularly, if you can, the exact condition of Mr. Clark in respect to injury or injuries as you found them on the date of your examination.

Mr. SEABURY.—We object on the ground that it appears from the examination of this witness that he is incompetent to testify concerning the injuries received by Mr. Clark, under paragraph 2535 Revised Statutes of Arizona, 1901.

(Deposition of Dr. Henry Dietrich.)

The COURT.—Yes.

Mr. KIBBEY.—It is not apparent that Mr. Clark was a patient of his.

[450] The COURT.—Isn't it apparent that he visited Mr. Clark to make the examination as a physician?

Mr. KIBBEY.—He might even do that.

The COURT.—Not if he was a physician and in charge of the case.

Mr. KIBBEY.—There is no evidence of that.

The COURT.—That will have to appear before the evidence can go in, that he was not.

Mr. KIBBEY.—The presumption does not follow that he was, although the fact is that he was.

The COURT.—The evidence is already in that he was the physician in charge of the case. Mr. Clark said Dr. Dietrich called upon him. The objection is sustained.

Mr. KIBBEY.—We desire to except to the ruling of the Court.

Q. 25. Please state whether or not you treated Mr. Clark as physician or surgeon for the injuries you have described. A. I did.

Q. 26. If you say that you did, when did this treatment begin and when did it end?

Mr. SEABURY.—We object to that as within the scope of the objection already pointed out.

The COURT.—Yes.

Mr. KIBBEY.—By admitting the other questions hasn't he waived his objection to subsequent questions along the same lines?

(Deposition of Dr. Henry Dietrich.)

The COURT.—They can waive all of it or any part of it. [451] They have a right to object to any portion that you see fit to offer. It is within the province of the plaintiff to waive the privileged nature of the communication.

Mr. McFARLAND.—The position we take is that by crossing these interrogatories and permitting the witness to be examined without objection, that they waived that right.

The COURT.—My understanding was that the stipulation expressly reserved that.

Mr. McFARLAND.—Not what they stipulated to do, but what they did do—that they went on and asked a number of questions—thirty or forty cross-interrogatories—and they were answered by Dr. Dietrich. Now it seems to me that the position that the plaintiff would be in in respect to depositions taken before an officer would be the same as though the witness were present in court. They have the right to object to them, but they didn't do it. The stipulation would be equivalent to the legal proposition that they could permit or waive it.

The COURT.—Where is the stipulation?

Mr. SEABURY.—(Handing the stipulation to the Court.) That is as to the original deposition. Of course we were obliged absolutely to take the cross-examination at that time, and our stipulation went to the objections at this time.

[452] The stipulation is as follows:

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

STIPULATION.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in this action, that the deposition of Dr. Henry Dietrich, a witness on behalf of the defendant, be taken before any person authorized to take depositions as provided for and designated under the provisions of subdivision 3 of Section 2515 of the Revised Statutes of Arizona, 1901, in any part of the world; that the direct and cross-interrogatories hereto attached shall go out with this stipulation, and the same propounded to said witness, and hereby waiving the issuance of any commission; that the deposition of said witness when so taken and returned may be read in evidence in this cause subject to the same objections and exceptions, as if said witness were personally present on the stand; that said deposition when so taken shall be certified to by the officer taking the same, and shall be inclosed in an envelope addressed to the Clerk of the United States District Court, at Phoenix, Ari-

(Deposition of Dr. Henry Dietrich.)

zona, U. S. A. This deposition may be used by either party to this cause.

Dated April 1st, 1912.

McFARLAND & HAMPTON,
Attorneys for the Defendant.

L. KEARNEY,
Attorney for the Plaintiff.

[453] The COURT.—(After reading the stipulation.) I think the stipulation covers—reserved the right to object.

Mr. McFARLAND.—I think that is true, but I think it is a privilege that he might exercise or might not at his direction.

The COURT.—At this time, I think.

Mr. McFARLAND.—Please note our exceptions.

Q. 27. State where Mr. Clark was during the period covered by this treatment.

Mr. SEABURY.—We urge the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—Exception.

Q. 28. If you say that you found on your examination, injuries to his ribs, state on which side the injuries were to the ribs, the number of ribs involved and the result of the treatment in this respect. (Same objection—same ruling—exception.)

Q. 30. If you say there were any injuries to the kidneys or either of them, state the result of your treatment. (Same objection—same ruling—exception.)

Q. 31. If you say there were bruises over the sacra-iliac joint, state the condition in this respect

(Deposition of Dr. Henry Dietrich.)
and the result of your treatment. (Same objection —same ruling—exception.)

Q. 32. You may state in detail, if you know the exact condition you found Mr. Clark in when you first examined him or treated him for the several injuries you have described and the result of this treatment. (Same objection—same ruling— [454] exception.)

Q. 33. If you examined his urine on the date of your first examination, you may state what you found in this respect, and the condition of his urine during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 34. State his temperature on the date of your first examination and during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 35. State whether you examined his pulse at the date of your first examination and during your treatment of him, and if there were any indications of any disease or affliction of Mr. Clark other than those in reference to the injuries you have described. (Same objection—same ruling—exception.)

Q. 36. State whether you examined his lungs at the date of your first examination and what were their condition. (Same objection—same ruling—exception.)

Q. 37. State, if you know, if there were any indications of pneumonia in either of his lungs at the time you first examined them, or at any time covered

(Deposition of Dr. Henry Dietrich.)

by your treatment. (Same objection—same ruling —exception.)

Q. 38. If you say there were, state whether you treated him in this respect and the result of your treatment. (Same objection—same ruling—exception.)

Q. 39. If you say that you examined Mr. Clark at the date of the accident or afterwards, state whether there were any marks of violence or bruises on his head, face or eyes or [455] either of them. (Same objection—same ruling—exception.)

Q. 40. State whether at the time of your first examination, or afterwards during your treatment of him, he made any complaint or called your attention in any way to any trouble with his eyes or either of them.

Mr. SEABURY.—We object.

The COURT.—Same ruling.

Mr. KIBBEY.—Just a minute. Please read that question again. (Counsel reads the question.) We think that is competent, and made so by the testimony of Mr. Clark.

The COURT.—I don't think that changes the rule. It is not a question of whether it is contradictory in its nature or not, but it covers the whole subject matter.

Mr. KIBBEY.—It takes away from it the nature of privilege.

The COURT.—I think not, under the rule. My understanding is that the whole matter is privileged whether there are thirty people present or not.

(Deposition of Dr. Henry Dietrich.)

Mr. KIBBEY.—The books state otherwise. If it is made in the presence of a number of people it shows that the patient doesn't care.

The COURT.—I think it covers the whole matter of communication as well as examinations, treatment, what he may have discovered, no matter if there be other sources of knowledge upon the same matter or not.

Mr. KIBBEY.—This is directed to a communication or lack of communication.

The COURT.—That is especially excepted.

[456] Mr. KIBBEY.—We take exception.

Q. 41. If you say he did, please state if you treated his eyes or either of them and the result of this treatment. (Same objection—same ruling—exception.)

Q. 42. If you say in answer to the above interrogatory that he complained of his eyes or loss of sight of his eyes or either of them, state whether you treated him for any trouble of his eyes and particularly with reference to the loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 43. Please state whether or not at the first examination you made of Mr. Clark or at any time subsequently during your treatment of him, did you discover any trouble with his eyes or either of them, or whether he ever complained during the time covered by your treatment, of any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

(Deposition of Dr. Henry Dietrich.)

Q. 44. State if at any time covered by your treatment of Mr. Clark for the injuries received, either during your treatment of them or at any time subsequent, did he complain of any trouble with his eyes or any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 45. If you say that he did, at a subsequent date, please state that date as near as you can remember. (Same objection—same ruling—exception.)

[457] Q. 46. If you state that Mr. Clark occupied quarters at his home in Clifton during your treatment of him for the injuries received in this accident, state whether during that treatment he used his eyes in reading while confined to his home. (Same objection—same ruling—exception.)

Q. 47. If you say he did, state the extent to which he used his eyes in this respect or otherwise. (Same objection—same ruling—exception.)

Q. 48. State whether during this time he made any complaint or called your attention to any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 49. You may state in a general way or in detail any fact or circumstance connected with your treatment of Mr Clark for injuries received as a result of this accident and particularly in reference to any trouble with his eyes or loss of vision while under your care as a patient, that you may consider proper or necessary in order to get at the facts in this case, as though you were especially interrogated

(Deposition of Dr. Henry Dietrich.)

in respect to same. (Same objection—same ruling —exception.) And this concluded the reading of the direct interrogatories.

Mr. SEABURY.—We offer no cross-examination, and we expressly offer no cross-examination in view of the Court's ruling.

[Testimony of Dr. H. H. Stark, for Defendant.]

[458] Dr. H. H. STARK, being called as a witness in behalf of the defendant and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. What is your name? A. Dr. H. H. Stark.

Q. Where do you reside? A. El Paso, Texas.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been engaged in the practice? A. Sixteen years.

Q. And where?

A. St. Louis and El Paso—two years in St. Louis and [459] fourteen years in El Paso.

Q. Are you a graduate of any medical college?

A. I am a graduate of the medical department of St. Louis University.

Q. Have you had any other educational opportunities?

A. Yes, I had a certificate of work with the university of Vienna, the university of Prague, and the Royal London Opthalmic in London.

(Testimony of Dr. H. H. Stark.)

Q. Have you made any special department of medicine or surgery your business?

A. Eye and ear work.

Q. For what length of time?

A. I have done nothing but that for the last six years.

Q. Do you know the plaintiff in this case, T. P. Clark? A. Yes, sir.

Q. How long have you known him?

A. I have known him since June a year ago.

Q. Where did you see him? A. At Clifton.

Q. At whose instance did you see him?

A. Mr. A. T. Thompson.

Q. Mr. Thompson was at that time connected with the defendant railway company?

A. Yes, sir. I don't know what his position was at that time—he was the head of it.

Q. He employed you to visit Mr. Clark, did he?

A. Yes, sir.

Q. Where did you see Mr. Clark?

A. In Clifton.

Q. Where in Clifton? A. At the A. C. hospital.

[460] Q. Did you make any examination of him at that time?

A. Yes, sir, I made an examination of his eyes.

Q. State what examination.

Mr. SEABURY.—We object to the question, and ask leave to cross-examine this witness for the purpose of showing the witness' disqualification and incompetency.

The COURT.—Very well.

(Testimony of Dr. H. H. Stark.)

(By Mr. SEABURY.)

Q. You say this examination took place in June, 1911? A. Yes, sir.

Q. At the hospital of the defendant company in Clifton? A. Yes, sir.

Q. Under the direction of Mr. Thompson?

A. Under his personal direction, you mean?

Q. Yes.

A. It was his request I examined him. I came there especially for that purpose.

Q. Did Mr. Thompson or the defendant company conduct the hospital?

A. No, but it is the only place I have to make such examinations.

Q. You wouldn't go there and make an examination simply because Mr. Thompson said so?

A. Yes.

Q. Without consulting the medical force?

A. Yes, sir, if he wanted the case examined, because he is in charge of the whole road.

Q. Now, were you at that time in the employ of the defendant company? A. No, sir.

Q. Did you have any connection or affiliation with its medical department? **[461]** A. No, sir.

Q. Or with its hospital? A. No, sir.

Q. Did Mr. Thompson pay you any fee?

A. He paid me for the examination.

Q. He did? A. Yes, sir.

Q. How long did the examination take?

A. Why, it probably took—I don't know—probably took a half or three-quarters of an hour.

(Testimony of Dr. H. H. Stark.)

Q. Do you recall what time of day it was?

A. You mean morning or evening?

Q. Yes.

A. No, I don't believe I do. I think it was in the morning, though I am not sure.

Q. Who was present at the time you made the examination?

A. Mrs. Clark was present and—I don't know—you see, the thing is situated this way: people are going in and out of the room all the time, so there might have been other persons present, perhaps Dr. Dietrich might have been present.

Q. Was this in the public ward of the hospital?

A. No, it is in the ex-ray room—the dark room.

Q. In a single room you conducted the examination? A. Yes, sir.

Q. Who was present?

A. Mrs. Clark was present. I had a conversation with her at the time. I know during a large part of the examination there was no one there but Mr. Clark, Mrs. Clark and myself.

Q. In other words, no other doctor was present.

A. Dr. Dietrich might have come in.

Q. Just in and out?

[462] A. I am not positive—I know he wasn't there all the time.

Q. Did he participate in the examination?

A. No, he did not.

Q. Had you met Mr. Clark before that?

A. No, I never had.

Q. Who introduced you to him?

(Testimony of Dr. H. H. Stark.)

A. I don't know—it might have been one of the nurses. I don't know who introduced me. I don't remember. That has been a year and a half ago.

Q. Do you know how you were introduced to him?

A. What do you mean?

Q. I mean how you were introduced to him—in what capacity? A. Me?

Q. Yes. A. No, I don't.

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the introduction was done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

Q. You don't think you did?

A. I don't remember.

Q. Now, Doctor, don't you know, as a matter of fact, that **[463]** Mr. Clark assumed you were one of the regular physicians of the defendant?

A. I am not able to tell what Mr. Clark assumed.

Q. That is what I asked you. If you don't know, that is the answer. You didn't tell Mr. Clark you were from El Paso?

A. Now, I don't know whether I did or not. I think perhaps Mr. Clark knew it.

Q. How do you think he perhaps knew it?

A. I think in the conversation that occurred that he said he had heard of me.

Q. That was after you had gotten into the examination, wasn't it? A. I don't know when it was.

(Testimony of Dr. H. H. Stark.)

Q. You don't remember? A. No.

Q. What is your best recollection on that subject? Do you think you discussed El Paso before or after you began to examine him?

A. I don't remember.

Q. You have no recollection of that?

A. That wasn't the important thing to me.

Q. It might have been of vital consequence to him as it is now? A. I don't know.

Q. How long did your examination take?

A. Between half an hour and an hour.

[464] Q. Did you derive any information concerning his condition except at that examination?

A. The condition of his eye?

Q. I mean of his general condition?

A. Only the conversation with him.

Q. Only from conversations with him at that interview? A. Yes, sir.

Q. That is the extent of your knowledge and acquaintance of the facts of his case?

A. Of course I knew he was injured before I came up.

Q. So your only knowledge was derived at that interview? A. As to the condition of his eye?

Q. Yes. A. Yes, sir.

Q. Did you make any other examination except as to the condition of his eye?

A. Other than that?

Q. Yes. A. No.

Q. The information which he gave you—was the information which he gave you necessary to enable

(Testimony of Dr. H. H. Stark.)

you to treat his eye or to properly diagnose his case?

A. No, I think I could have made a diagnosis without him saying anything about it.

Q. You think you could?

A. Yes, you understand that is part of the routine of the examination—questioning a patient.

[465] In other words, that is the only method you have of securing the subjective symptoms.

A. Yes—objective symptoms, of course, we discover ourselves.

Q. So you can say that all the subjective symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes, sir, that is right.

Mr. SEABURY.—Now, if your Honor please, I would like to call Mr. Thompson.

The COURT.—Very well.

[Testimony of A. T. Thompson, for Plaintiff (Recalled).]

A. T. THOMPSON, being recalled as a witness by counsel for the plaintiff for examination upon the question of the admissibility of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Thompson, Dr. Stark has testified that you requested him to call and examine the plaintiff. Had you ever secured any consent from the plaintiff to permit Dr. Stark to examine him?

A. No, sir.

Q. Do you know whether Mr. Clark knew that

(Testimony of A. T. Thompson.)

Dr. Stark was not one of the regularly employed physicians of the defendant?

A. I don't know what he knew.

Q. You do not. Dr. Stark testified that you compensated him for his attendance upon Mr. Clark on this occasion. He didn't **[466]** mean that you compensated him out of your own pocket?

A. No, sir.

Q. You did not so compensate him?

A. No, sir.

Q. Isn't it a fact that you compensated him out of the funds of the defendant? A. Yes, sir.

Q. Isn't it a fact that the funds came from the hospital fund to which the plaintiff among others contributed? A. No, sir.

Q. From what fund did it come?

A. That was charged direct against the Arizona and New Mexico Railway, for it was in the nature of a special fee and wasn't subject to the society's funds.

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir, it did at that time.

Q. Will you please tell us what the privileges to workmen in the employ of the defendant included with reference to medical attention in such department?

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital? A. Yes, sir.

(Testimony of A. T. Thompson.)

Q. That includes, of course, the diagnosis of a man's **[467]** injuries at the company's hospital?

A. Oh, yes.

Q. And there was no limitation or restriction, was there, as to the kind of medical attention which the company was to accord the injured employee?

A. No, there was no limitation, if I understand you right.

Q. No difference between a general and a specially employed doctor?

A. It is a recognized thing that the company has its own physicians and surgeons, and these are the men that attend to any patients—company patients—who may go into the hospital and who are entitled under the fees they have paid into the society for their attendance.

Q. But the fact is as you have already stated that the defendant did compensate Dr. Stark for his medical attendance upon the plaintiff in this particular instance? A. Yes, sir.

Q. I ask if there was anything that you know of which would disclose or tend to disclose to the plaintiff any difference in Dr. Stark's connection with the defendant and other physicians who were in attendance upon him.

A. I cannot conceive how Mr. Clark would connect Dr. Stark with the society in any way.

Q. It is a fact that the examination took place in the hospital?

A. So the doctor says. I don't know where it took place.

(Testimony of A. T. Thompson.)

[468] Q. Is it the defendant's or the Arizona Copper Company's?

A. It doesn't really belong to the railroad company or the Copper Company. It belongs to the society.

(By Mr. KEARNEY.)

Q. Has the society any legal existence as a copartnership or a corporation?

Mr. McFARLAND.—That is a legal conclusion.

Mr. KEARNEY.—Do you know as a matter of fact whether it has articles of incorporation?

The COURT.—What difference does it make?

Mr. KEARNEY.—My information is that it is only separate in name—neither a copartnership nor a corporation.

Mr. McFARLAND.—It is immaterial whether it is a copartnership or a corporation.

The COURT.—I don't think that makes any difference here.

Mr. SEABURY.—I renew the objection already urged. I think we have shown the existence of the relation of patient and physician to have existed between this witness and the plaintiff.

The COURT.—I don't think you have shown the existence of the relation of physician and client. The best that you can say in that behalf is that the plaintiff may have understood that any communication he gave to the doctor that that relation existed. Under the testimony thus far adduced the fact is just otherwise.

Mr. SEABURY.—But, if your Honor please, we claim as a [469] matter of law that when a com-

(Testimony of A. T. Thompson.)

pany undertakes to supply medical treatment to its employees who are injured and actually makes a reduction from the salary or wages of the employees—

The COURT.—I understand all that.

Mr. SEABURY.—That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The COURT.—That is unquestionably true, and on that theory I ruled out the declarations of Dr. Dietrich.

Mr. SEABURY.—We claim further that there is no difference as a matter of law between special employment and a general one.

The COURT.—I understand this examination was in reference to this law suit.

Mr. SEABURY.—There is no testimony to that effect.

The COURT.—The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. SEABURY.—I don't know what the purpose of it was.

The COURT.—If it was, of course, then, that ends it.

Mr. SEABURY.—Suppose it was for the purpose of negotiating a settlement, it would be improper for us to go into the purpose.

The COURT.—It must be established that he was Mr. Clark's physician.

Mr. SEABURY.—We admit that, but we think

(Testimony of A. T. Thompson.)

that under these circumstances he has the right to claim it.

Q. You don't think from Mr. Thompson's statement that the [470] employment of the doctor was under that society arrangement, whatever that was? He stated quite the contrary.

Mr. SEABURY.—I think it was a special arrangement, undoubtedly. He has testified the remuneration did not come out of that special fund, but I don't think that would change the course of conduct of the defendant.

The COURT.—The thing in my mind is simply this: Whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had a good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. SEABURY.—Then the surrounding circumstances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have been previously examined under in the hospital under a doctor of the association.

The COURT.—It doesn't make any difference where it occurred, in his house or elsewhere. If he was there as a hostile witness to get information—not for his benefit, but for somebody else's benefit, and if the plaintiff understood that at that time, he

(Testimony of A. T. Thompson.)
certainly—the communication, whatever it was, was certainly not privileged.

Mr. SEABURY.—May I ask if the plaintiff understood that there was no difference between this doctor and Dr. Dietrich, for example? Would that affect the Court?

[471] The COURT.—I am inclined to think so. The only thing is whether the circumstances were such as to put Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physician, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. SEABURY.—May I call the plaintiff to ascertain what he understood in this matter?

The COURT.—Yes.

[Testimony of Thomas Clark, Recalled in His Own Behalf.]

THOMAS P. CLARK, the plaintiff, being recalled as a witness by counsel for the plaintiff upon the question of the admission of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Clark, do you remember the day Dr. Stark examined you?

A. I remember him examining me very well.

Q. Had you ever seen him before that?

A. No, sir.

Q. Had you been examined by any other doctors of the defendant in the same place? A. No, sir.

(Testimony of Thomas P. Clark.)

Q. You never had? A. No.

[472] Q. You knew, however, that that was the hospital? A. Yes, sir.

Q. Did you know where the hospital was and what it was? A. Yes, sir.

Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which injured employees of the defendant are examined?

A. Yes, sir.

Q. Did you know that to be the fact at the time of your examination? A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Stark?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it?

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you with reference to the purpose for which that examination was requested or required? A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company or for your benefit? [473] A. I don't know.

Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

Q. Is that what you understood? A. Yes.

Q. Did you or did you not believe that Dr. Stark was in consultation with Dr. Dietrich your attending

(Testimony of Thomas P. Clark.)

physician? A. Yes, sir.

Mr. KIBBEY.—You are leading him right along.

The COURT.—I think the communication is privileged—I will sustain the objection.

(By Mr. KIBBEY.)

Q. You say Dr. Dietrich was there?

A. He might have been in and out.

Q. As a matter of fact, he wasn't in town, was he?

A. Yes, sir, I think so.

Q. You had a conversation with Dr. Stark, didn't you? A. Yes, sir.

Q. In the course of that conversation did you state to Mr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. KIBBEY.)

Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

[474] Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

(By Mr. KIBBEY.)

Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work or anything of that kind?

Mr. SEABURY.—We object.

The COURT.—Is this a general examination—isn't it as to this matter of the competency of this doctor?

(Testimony of Thomas P. Clark.)

Mr. KIBBEY.—I am trying to get to the matter of the competency of this doctor.

Mr. SEABURY.—The question is did you have any talk with the company. I don't see what—

The COURT.—You may answer.

The WITNESS.—No, sir.

(By Mr. KIBBEY.)

Q. You had not had any talk with any of them up to that time? A. No, sir.

Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye?

A. I told Dr. Dietrich about it and he made the appointment with the doctor, I suppose.

Q. Didn't Dr. Dietrich tell you the company wanted an examination made for their information as to your condition [475] and didn't you so understand it?

Mr. KEARNEY.—We object to that as a privileged communication.

The COURT.—I overrule the objection.

The WITNESS.—I told Dr. Dietrich about it and he tried to examine it himself, and then he made the date with Dr. Stark a few days afterwards.

Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?

A. I supposed that was the object—very likely.

Q. You understood when the examination was made that it was for the purpose of getting information for the company? A. Yes.

(Testimony of Thomas P. Clark.)

Mr. KIBBEY.—Now, we think it is competent.

The COURT.—That answer is contradictory to the other.

Mr. SEABURY.—Absolutely, your Honor.

Mr. KIBBEY.—Yes, it is.

Mr. SEABURY.—However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness' testimony both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.

Mr. KIBBEY.—I think it is quite obvious to the contrary.

[476] Mr. SEABURY.—We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know—

The COURT.—I will put a question.

(To the witness.)

Q. What did you understand was the object of this examination of your eyes?

A. To know whether it was injured or not.

Q. What difference did it make whether it was injured or not in your judgment?

A. It would make a whole lot.

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it? A. I did.

Q. You wanted it?

(Testimony of Thomas P. Clark.)

A. I wanted to know the condition of it. When I reported to Dr. Dietrich he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared there.

Mr. SEABURY.—We think that makes it too clear, your Honor.

The COURT.—I think so.

[477] (By Mr. KIBBEY.)

Q. Did you know that Dr. Stark did not belong to the society's corps of physicians? A. To what?

Q. To the society's staff.

A. No, I didn't know anything about it.

Q. Had you ever seen him before?

A. Not that I know of.

Q. Did you ever hear of his attending anyone else there before?

A. You say Dr. Dietrich or Dr. Stark?

Q. Dr. Stark. A. I never heard of him at all.

Q. Had you heard of him before? A. No, sir.

Q. You knew he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Dietrich said he would have their man.

Mr. KIBBEY.—That is all.

(Witness excused.)

[478] Mr. KIBBEY.—Shall we make a statement of what we desire to prove by Dr. Stark? We have to get it into the record in some way.

Mr. SEABURY.—Will it not be enough to show

they wished to examine Dr. Stark with reference to the condition he found to exist?

Mr. KIBBEY.—And what that condition was and the inferences from it.

The COURT.—You expect to show that that condition was different from the condition as shown by the testimony adduced on behalf of the plaintiff himself, and contrary to the inferences to be drawn from the testimony of the witnesses for the plaintiff?

Mr. KIBBEY.—Yes.

The COURT.—The objection is sustained on the ground that the communications and the examination was of a privileged character and comes within the rule.

Mr. KIBBEY.—We except to the ruling of the Court.

(Mr. Kibbey thereupon stated to the Court that the defense proposed to prove by the witness Dr. Stark, and avowed that said witness would testify that at the time mentioned he examined the eye of the plaintiff and from his examination he discovered a condition that indicated that the blindness of the plaintiff had existed long prior to the date of the alleged injury; that he found that the optic nerve was atrophied, and other physical conditions from which the conclusion that the cause of his blindness existed long anterior to his accident is inevitable. Counsel further stated that upon this testimony of Dr. Stark the [479] defense further desired to frame hypothetical questions to be submitted to Doctors Goodrich and Smith, who were present, and further avowed

that said witnesses would further testify that the existence of the conditions of the eye that Dr. Stark found led to the same conclusion.

Thereupon Mr. Seabury, in behalf of the plaintiff, stated that if Doctors Goodrich and Smith, or either of them, were called as witnesses, he would show by cross-examination that they each sustained the same confidential relation as existed between Dr. Stark and the plaintiff, and that they would be shown to be incompetent to testify as to any fact or facts coming within their knowledge by reason of said relation, their testimony in relation thereto being of a privileged nature, defendant's counsel conceding that all the information acquired by Doctors Goodrich and Smith of plaintiff's physical condition was acquired from plaintiff by communication or personal examination of him during the existence of the relation of physician and patient between each of said physicians and said plaintiff, and that such information was necessary to enable each of such physicians to prescribe and treat the plaintiff professionally.)

[Testimony of A. T. Thompson, for Defendant (Recalled).]

A. T. THOMPSON, recalled as a witness on behalf of the defendant and having been heretofore duly sworn in this case, testifies further as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. I understand this hospital association is a separate and distinct concern from either the Arizona Copper Company or the Arizona and New Mex-

(Testimony of A. T. Thompson.)

ico Railway Company? A. Yes, sir.

Q. It is not either operated or managed by them?

A. No, sir.

Q. Now, will you state for what reason you employed Dr. Stark?

The COURT.—I thought we had finished that matter, Judge.

Mr. KIBBEY.—We are trying to struggle out of it.

The COURT.—You wish to renew your offer and to reopen this matter of *voir dire*—that is the purpose?

Mr. KIBBEY.—That is one of them.

The COURT.—When the Court has ruled and the matter is ended it is unusual to proceed as if the matter is still open. Of course it is within the discretion of the Court to permit that to be reopened—examination on *voir dire*—and if that is your purpose you may do so.

Mr. KIBBEY.—That is our purpose.

The COURT.—He has already stated that, however. I don't desire to take up too much time.

[480] Mr. KIBBEY.—I desire just to ask one question on that line.

The COURT.—Very well.

(By Mr. KIBBEY.)

Q. What was the purpose in employing Dr. Stark?

Mr. SEABURY.—We object to the question as immaterial.

The COURT.—It makes no difference unless that

(Testimony of A. T. Thompson.)

purpose was made known to Mr. Clark. I still hold it is privileged.

Mr. KIBBEY.—Very well.

(To the witness.)

Q. Did you see Mr. Clark at any time after the accident, and if so, how recently after the accident did you first see him?

A. I saw Mr. Clark two or three times during April and May. I couldn't give you it any closer—early in May or in April, 1911.

Q. Did you have any conversation with him with reference to his physical condition? A. Yes, sir.

Mr. SEABURY.—We object to the question as having been asked and answered, at least once before. He testified that he offered Mr. Clark work on the slag engine.

The COURT.—I don't think so—not this witness.

Mr. SEABURY.—Very well.

The COURT.—Proceed.

(By Mr. KIBBEY.)

Q. Did you have a conversation with him in reference to his condition? A. Yes, sir.

Q. Where was that conversation?

A. I met him at the depot, I think, and we chatted there on the depot platform.

[481] Q. What was his apparent condition?

A. He was out and walking around and I was surprised he was looking so well.

The COURT.—This witness has testified as to that—he said he inquired of his condition, and so forth.

Mr. KIBBEY.—I think this witness has not been

(Testimony of A. T. Thompson.)
on the stand on that.

Mr. KEARNEY.—It was Dr. Dawson and Mr. Reissinger.

The COURT.—Perhaps you are right about that. Proceed.

(By Mr. KIBBEY.)

Q. What was said in that conversation or any other that you may have had, with reference to his condition? Give all that was said.

A. I can't recall the exact words that passed, but I met Mr. Clark on the platform and shook hands with him and said I was glad to see him out again and asked him how he was feeling, and he told me—expressed the—said that he was feeling glad he had gotten off so light in the accident and thought himself very lucky. He told me that he had his ribs injured—

The COURT.—Did you testify to that this morning?

The WITNESS.—No, sir.

Mr. SEABURY.—I have a distinct recollection to his testifying to exactly the same thing.

The COURT.—Proceed.

Mr. KIBBEY.—Go ahead.

The WITNESS.—And also his hip. We chatted there for a short time and I spoke to Mr. Clark and wanted to know generally what his condition was—like that, in a general way—and also what his idea was about himself, so far as the company was concerned, not with reference to a settlement, but with reference [482] to his employment, and I got the

(Testimony of A. T. Thompson.)

impression from Mr. Clark—

Mr. SEABURY.—We object to his impression.

Mr. KIBBEY.—State substantially what he said.

The WITNESS.—This is substantially what Mr. Clark told me: He expected to be fit for work in a short time then.

(By Mr. KIBBEY.)

Q. Did he in that conversation or any other conversation say anything to you about his vision or any injury to his eye? A. No, sir.

Mr. KIBBEY.—That is all.

Cross-examination.

(By Mr. KEARNEY.)

Q. Didn't you in that same conversation speak about employing him at some future time, and you said, Mr. Clark, you have lost an eye. Didn't you use that expression? A. No, sir.

Q. Then why is it that you were so anxious very soon after that time to employ this specialist and bring him in here?

A. That was later on, Mr. Kearney.

Q. Can you say what day you had any conversation with Mr. Clark about this matter?

A. Not the day.

Q. Will you swear it was in April?

A. I said in April or May. It was prior to Mr. Clark's leaving for El Paso.

Q. Do you know whether or not Mr. Clark left in April or not and went to El Paso?

A. No, I think he left in May.

(Testimony of A. T. Thompson.)

Q. You think, then, that he was in Clifton until May 20th?

A. No, I think it was—I think Mr. Clark was in El Paso around, I think, May 10th or May 13th.

[483] Q. He was in El Paso on that date. But in May he went to El Paso?

A. That is my recollection that he went to El Paso in May.

Q. Now, I ask you if you are willing to make the statement whether or not Mr. Clark was there in Clifton from April 2th to May 10th.

A. No, I am not willing to make that statement. I don't know what date he left.

Q. Then will you deny he was not there—that he was away in El Paso from April 21st until May 21st?

A. That he was in El Paso at all?

Q. In El Paso during that period.

A. I understand he was in El Paso around May 13th. I won't swear to it.

Q. Wasn't he in El Paso up to May 25th?

A. I don't know when he came back.

Q. All this time you were an officer of the company, were you not? A. Yes, sir.

Q. And you have been here ever since this case started—here in Phoenix ever since this case began?

A. Yes, sir.

Q. You had for the company chief management of the case here with the attorneys, haven't you?

A. Here?

Q. Yes. A. No, sir.

Q. Haven't you advised the assistant attorneys all

(Testimony of A. T. Thompson.)

you could in this case? A. Yes, sir.

Q. And you wish to do all you can to defeat this case?

[484] A. Yes, sir. I was employed by the Arizona and New Mexico Railway at the time this accident occurred. I was in charge of the road at that time.

Q. Is it the purpose of your company when an employee sustains an injury—your company does everything to defeat claims of this character?

Mr. KIBEY.—We object to that. It does with fraudulent claims of this kind.

Mr. SEABURY.—We protest against the response, if the Court please.

The COURT.—Both the question and the response are wholly uncalled for and should be wholly disregarded by the jury.

(By Mr. KIBBEY.)

Q. When did you first hear anything about the injury to his eye?

A. After Mr. Clark got back from El Paso.

(By a JUROR.)

Q. Didn't you state in your evidence that you offered him work and he refused—the other day?

A. No, that question was not asked me.

Mr. KIBBEY.—I think the Court has fallen into a mistake in regard to what Mr. Thompson has testified to. On cross-examination I asked Mr. Clark about a conversation he had with Mr. Clark, and the Court would not permit him to testify at that time—requiring us to reserve the examination until we

(Testimony of A. T. Thompson.)

called him ourselves.

(By Mr. McFARLAND.)

Q. Did you have a conversation with Mr. Clark at a date subsequent to the one you have testified to?

Mr. SEABURY.—We respectfully object to recalling the witness [485] for the purpose of dilating on these conversations.

The COURT.—Which conversation is that?

Mr. SEABURY.—The one with Mr. Clark.

Mr. McFARLAND.—The impression has gotten abroad that there was an offer of a job.

Mr. SEABURY.—May it be confined to that?

The COURT.—Yes.

(By Mr. McFARLAND.)

Q. About how long after the first conversation was it?

A. It was after the first conversation. I am not sure of the month even—I couldn't recall the month without refence to my notes in the case.

Q. What was said of Mr. Clark and what was said by you in that conversation?

A. The object of Mr. Clark's visit to me in that meeting—

Mr. SEABURY.—We object to the witness stating the object of the visit.

Mr. McFARLAND.—Just state what was said by Mr. Clark and by yourself. Where was it, Mr. Thompson?

The WITNESS.—I am trying to condense this in my mind to answer your question so I will just give you the substance. It was quite a long, protracted

(Testimony of A. T. Thompson.)

meeting we had and discussed his condition with reference to employment. To put that in as few words as possible, we explained to him his position with reference to the engine he had been running in the yard; that on account of his condition of not being able to see with one eye we could not put him back safely on that switch engine; that we would consider where we could employ Mr. Clark and give him employment, and we had decided that he could with safety employ Mr. Clark on the slag engine handling the slag between the [**486**] smelters and the slag dump.

(By Mr. McFARLAND.)

Q. At what wages?

A. The remuneration was the same as he was getting before, namely, one hundred and seventy-five dollars a month.

Q. Did he accept or reject that offer?

A. No, he asked us—he stated that the slag engine might not be a permanent job, which was perfectly true, and I told him that if the slag engine was taken off we would find work for him in the shops—not working at a bench, but some work entirely satisfactory to him, because we had previously discussed with the master mechanic if we could employ Mr. Clark there, and his salary would be the same.

Q. So that he would get one hundred and seventy-five dollars per month for the employment?

A. That was the object.

Q. Did he accept?

A. Mr. Clark said he would take the matter under

(Testimony of A. T. Thompson.)

advisement. That he would like to think it over, and he left. This meeting took place in Mr. Carmichael's office.

Q. Did he come back?

A. Some days later we had a request from Mr. Clark for a further meeting and we had a further meeting with him in my office. He came in and said he had three propositions to submit to me, in which he thought a settlement could be arrived at in his case. I told him that I would be very glad to consider the propositions. He then pulled out of his pocket one sheet of paper which was in letter form, and this was a part of a letter, which part contained his first proposition.

Mr. SEABURY.—We object to any further discussion as to what [487] the propositions were if they involved an offer of compromise.

The COURT.—I sustain the objection.

Mr. McFARLAND.—I want to find out if he finally accepted or rejected the proposition of the slag engine.

The WITNESS.—No, he didn't accept the proposition of the slag engine.

(By Mr. SEABURY.)

Q. Did you in fact ever employ Mr. Clark after this accident? A. No.

Q. You never did? A. No.

Mr. SEABURY.—That is all.

(Witness excused.)

Mr. McFARLAND.—I presume we might save time by offering Dr. Goodrich, a physician and sur-

(Testimony of Thomas P. Clark.)

geon of Morenci, to testify along the same lines as Dr. Stark and Dr. Smith, and that the objections to his testimony will be the same as to the testimony of Dr. Stark and Dr. Smith, and that their testimony has been excluded.

Mr. SEABURY.—That is right—and that we could show the same thing, if permitted.

Mr. McFARLAND.—The defendant rests.

[Testimony of Thomas P. Clark, Recalled in His Own Behalf.]

THOMAS P. CLARK, the plaintiff, being called as a witness in his own behalf, and having been heretofore duly sworn in this case, testifies further as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. Mr. Clark, Mr. Reissinger took the stand this morning and testified to having some conversations with you after the accident. Did you ever have any conversation with Mr. Reissinger [488] after the accident? A. No, sir.

Q. No conversation at all?

A. Only just to bid him the time of day.

Q. You did meet him after the accident, didn't you? A. Yes, sir.

Q. What, if any, conversation did you have with him?

A. Not anything more than he asked my condition and I told him.

Q. Did you ever tell him that you thought you were luckily out of that accident, or anything to that

(Testimony of Thomas P. Clark.)

effect? A. Not a thing.

Q. Did you ever say you were glad to be out of it and that you thought you were lucky to have escaped, or anything to that effect? A. No, sir.

Q. Did you discuss your injuries with him at all?

A. No, not much.

Q. Now, Mr. Thompson has testified that he had conversations with you with reference to your injuries after the accident. A. Yes, sir.

Q. Do you recall how many times you met Mr. Thompson after the accident in which your condition was discussed? A. Probably twice.

Q. Will you tell us what was said between you at that time?

A. I went to his office by appointment. He wanted to know if I was ready to settle, and I told him I wasn't.

Q. I ask you, did the conversation relate only to a settlement of your action against the company?

A. I wanted to get passes to go to California on business and for my health too, and I don't think it was discussed at that [489] time.

Q. You don't think the settlement was discussed?

A. I don't think it was.

Q. The conversation related to your getting passes to go to California for your health? A. Yes, sir.

Q. Did you at any time say to Mr. Thompson that you were well out of the accident and very lucky to have escaped, or anything to that effect?

A. No, sir.

(Testimony of Thomas P. Clark.)

Q. Do you remember his offering you employment on the slag engine? A. Yes, sir.

Q. Tell us what was said in reference to the slag engine.

A. He said he would give me work on the slag engine, but the slag engine wasn't running—the job didn't exist.

Q. Would you have received any pay while the engine was not running?

A. I don't know—I don't think so.

Q. That was not specified?

Mr. BENNETT.—We object to the leading form of the questions.

Mr. SEABURY.—This is in rebuttal.

The COURT.—That doesn't make any difference. He can state what was said as well as the other man—it doesn't require leading questions.

(By Mr. SEABURY.)

Q. Was any other offer of employment made to you by Mr. Thompson or any of the defendants, after the accident?

A. He said I could work in the shops, but I wasn't able to work in the shops.

Q. Did you ever go to work in the shops?

[490] A. No, sir; they didn't ask me to go to work.

Q. Did you receive from the defendant any passes or transportation to California? A. No, sir.

Mr. McFARLAND.—We object to that as irrelevant and immaterial.

(Testimony of Thomas P. Clark.)

The COURT.—The objection is sustained as to that question.

Mr. SEABURY.—We except.

(To the witness.)

Q. Now, Mr. Clark, going back to the day of the accident and the time in which you received the signal to stop, I want to ask you as a railroad man whether you did everything that could be done at that time to stop that car in the shortest possible time.

Mr. McFARLAND.—We object.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

The COURT.—That is not rebuttal.

Mr. SEABURY.—The evidence I am endeavoring to rebut is the evidence of three witnesses.

The COURT.—That is part of your main case.

Mr. SEABURY.—As to what he did?

The COURT.—Yes, hence it would not be rebuttal.

Mr. SEABURY.—But the defense showed or attempted to show that the car could have been stopped.

The COURT.—That was in answer to what you said.

Mr. SEABURY.—Very well, your Honor; that is all, Mr. Clark.

Cross-examination.

(By Mr. McFARLAND.)

Q. Now, you say, Mr. Clark, that the company did offer you the slag engine? A. Yes, sir.

[491] Q. And you said it was not running?

A. Yes, sir.

Q. And in that conversation didn't Mr. Thomp-

(Testimony of Thomas P. Clark.)

son tell you if it didn't run he would give you other employment? A. Yes, sir.

Q. And that monthly employment either on the slag engine or other employment, would amount to one hundred and seventy-five dollars a month?

A. Yes, sir.

Mr. McFARLAND.—That is all.

(Witness excused.)

Mr. SEABURY.—Now, your Honor, I am prepared to recall Mr. Chambers and Mr. Doran for the purpose of showing that Mr. Clark did do everything that could be done to stop that engine within the shortest possible time.

Mr. KIBBEY.—They both testified to it.

The COURT.—I think it is not rebuttal.

Mr. SEABURY.—Very well, your Honor. Your Honor will permit me to except.

The COURT.—Certainly.

Mr. SEABURY.—We now rest.

Thereupon the Court takes a recess for fifteen minutes, the jurors being admonished by the Court as heretofore, and at the conclusion of the recess the jurors return into court and are called by the clerk, all answering to their names, and thereupon comes the argument of counsel to the jury which proceeds until the hour of adjournment, when the Court again admonishes the jury not to talk about the case, and thereupon takes a recess until nine o'clock A. M. November 16th, 1912.

[492] Saturday, November 16th, 1912.

At nine o'clock A. M. this day, the plaintiff being present in person and represented by counsel, and the defendant being present by its counsel, the jurors come into court and are called by the clerk, all answering to their names, and thereupon comes the further argument of the case to the jury by counsel until its conclusion, when the Court instructs the jury as to the law, the instructions being taken down by the reporter and transcribed in a separate transcript, and two bailiffs having been sworn to take charge of the jury, they retire from the courtroom in charge of their sworn bailiffs to consider of their verdict, and thereupon the following further proceedings are had herein, to wit:

The COURT.—Do either of you except to the statement of issues as made by the Court?

Mr. SEABURY.—I respectfully except to the numbered requests submitted by the defendant and charged by the Court. The rules expressly provided that we may except to such matters generally. I now respectfully except to the modification made by the Court of the plaintiff's requests number three A in so far as the charge as modified states in substance that if the jury believe that plaintiff was guilty of wilful negligence or gross negligence that then they must find for the defendant upon the ground that there is no issue of wilful or gross negligence on the part of the plaintiff in this case, and that the evidence adduced in the case is not susceptible of the inference that the plaintiff was guilty of

gross or wilful negligence, and in that connection we respectfully request your Honor to instruct the jury that there is no such question in this case as wilful neglect or want of care on the part of the plaintiff.

Thereupon the request is argued at length by plaintiff's counsel **[493]** to the Court, at the conclusion of which the Court says:

The COURT.—I am not apprised as yet of any necessity of recalling the jury to modify the instructions. Now, what have you to say, Judge McFarland?

Mr. McFARLAND.—We except to that part of the charge of the Court in reference to the liability of the defendant by reason of the fact that the state or the then territory at the date of the alleged accident, for the reason that the complaint alleges and all of the proof is based upon the fact that the injury occurred while the defendant company as a common carrier was engaged in interstate commerce and that it is a variance and no allegations authorize the introduction of any such evidence.

The COURT.—Do you think it necessary to state the grounds of your exception?

Mr. BENNETT.—Unless the rules or statute require it, I don't think so.

The COURT.—The rules do not require it.

Mr. McFARLAND.—We except to that part of the Court's charge in reference to the assumption of risk. The rule laid down by the Court, we think, is proper, but the modifications of it practically eliminate the principle set forth in the rule; and to

that part of the charge in reference to gross negligence and slight negligence; and that part of the charge in reference to comparative negligence; and to that part of the charge wherein the Court said to the jury that the plaintiff might assume that the law would presume that the defendant had discharged its duty—one assumption is interposed and not the corresponding one—the part of the defendant.

The COURT.—That will be paragraph ten of the Court's instructions.

Mr. McFARLAND.—We also desire to except to the giving of **[494]** each one of the instructions requested by the plaintiff and given by the Court, and we desire to except to the refusal of the Court to give each one of the instructions requested by the defendant and refused by the Court. We desire to except to each of these severally. I think beyond that we are not required to go.

The COURT.—I think that ought to be sufficient.

Be it further remembered that at the trial of said cause, and before the jury retired to consider of their verdict, that the Court granted permission to the defendant to embody into its bill of exceptions, if it should tender one, its objections to the instruction of the Court to the jury more at length and in detail.

[495] The deposition of J. C. Gatti, omitting caption and certificate, is as follows:

[Deposition of J. C. Gatti.]

Direct Examination.

(By L. KEARNEY.)

My name is J. C. Gatti; age, 41, and I reside at Clifton, Arizona, and am employed as a butcher.

Q. How long have you resided in Clifton?

A. About 16 years.

Q. Do you know the plaintiff in this action?

A. I do; yes, sir.

Q. Did you know the plaintiff on or about March 15, 1911?

A. Did I know him at that time? Yes, sir.

Q. Did you see him on that day?

A. Well, now, I don't know. I have forgotten the day of the accident.

Q. Are you acquainted with that piece of railway track of the defendant, extending from the depot in Clifton, down to the railroad bridge that crosses the San Francisco River, in the town of Clifton, in Greenlee County, Arizona?

A. Yes, sir, I know where those tracks lay.

Q. On the day mentioned, March 15, 1911, did you at *that witness* an accident in which the plaintiff was injured by collision of cars? A. Yes, sir.

Q. What place was that?

[496] A. That was right at the switch; one branch goes up to the Shannon Hill and the other comes down Hill's Addition right to the forks of the tracks.

Q. .I wish you would go ahead now, Mr Gatti, and tell what you saw there.

(Deposition of J. C. Gatti.)

A. Well, I was in the shop at the time and I heard the whistle blow. It called my attention for the reason that it was unusual. I then came out of the butcher-shop and stood out there and looked and I saw that there was a car on the upper track, that is, on the Shannon Track, that was moving. This train was on the Hill's Addition track, that is, on the main track, was going ahead, and all of a sudden they met there, that car came down and butted against the engine and some boards went right through. I then went right away to see what was the matter. I went between the two tracks, that is, between the Shannon Hill track and the main track, couldn't see anything on the other side and as I got there I found Mr. Clark on the ground laying down. Mr. Kelley was there looking at him and another fellow or two, I forget who they were I went up there and tried to pick him up, but he said. "Let me alone for a while until I get my breath." Mr. Kelly and myself picked him up, and we came down the line. Mr. Kelly was out of wind and could not help me any more. So I helped him down (Mr. Clark) as far as his yard steps, where there is an embankment or wall before you get to the house, and also two steps going up and two **[497]** down. When we got there Mr. Clark requested me to let him alone, that, he could make it by himself for reasons he said that his wife might get frightened. And that is all that I know.

Q. Did you see the freight-cars when they first started to roll?

(Deposition of J. C. Gatti.)

A. I don't know as I saw them when they first started to roll, but when I came out they were rolling, but what called my attention was the whistle. I think there was one or two and I heard the clash. I saw how the two were moving and I was expecting it.

Q. How close were they to the switch engine when you first saw them?

A. It was pretty close, because I saw them moving, and it was not very long after I saw them come together.

Q. Did you notice Mr. Clark's position before the freight struck the engine?

A. I did not. When I saw him he was on the floor and couldn't move.

Q. Had he received the injury when you saw him?

A. Yes, sir, he was on the floor and couldn't get up.

Cross-examination.

(By McFARLAND and HAMPTON.)

Q. What time of the day was this, Mr. Gatti?

A. As near as I can remember it was in the morning; it has been quite a while ago.

[498] Q. Was it in the daytime?

A. Yes, sir, it must have been between, well, it wasn't 10 o'clock. As a rule, in the morning I am around the shop.

Q. How far is the meat-shop from the place where the cars and the engine came in contact with each other?

A. It must be 100 yards; not over that.

(Deposition of J. C. Gatti.)

Q. On which side of the track would that be? West? A. Coming toward them it was north.

Q. Where would your place of business be?

A. South.

Q. You say your attention was first called to the train by the whistle? A. The unusual whistle.

Q. Where was that whistle?

A. Right there between there and where they met.

Q. Was it the whistle of the engine?

A. Yes, sir.

Q. The engine on which Mr. Clark was?

A. Yes, sir, I am sure it was there.

Q. You heard that while you were in the shop?

A. Yes, sir.

Q. How long was it after you got out before the collision?

A. Wasn't very long; hardly two or three minutes, I know.

[499] Q. The collision while you were in your place? A. No, I believe I was on the way.

Q. And the cars on the main line were moving slowly north?

A. No, on the Shannon line, those were the cars that were moving.

Q. After you got out now, and after you heard this whistle, the cars were moving slowly up the Shannon switch?

A. Down, not up; they were pretty close to the junction then and that is what called my attention.

Q. The moving north on Shannon switch?

A. Yes, sir.

Q. Remember how many there were?

(Deposition of J. C. Gatti.)

A. No, sir, they were standing.

Q. Now, what were the cars on the main line doing when you first noticed them?

A. They were attached to Mr. Clark's engine; there were some cars attached to his engine on the main line going north.

Q. Then the cars that caused the collision with Mr. Clark's engine were coming down Shannon switch? A. Certainly.

Q. And you say they were the cars that came in contact with Mr. Clark's engine?

[500] A. Yes, sir.

Q. So the engine was attached to the cars on the main line? A. Yes, sir.

Q. No cars attached on the Shannon switch?

A. No, they were standing still.

Q. Were there any other cars on the main line except those to which Mr. Clark's engine was attached? A. I didn't notice any.

Q. You say Mr. Kelley was present when you first got to Mr. Clark?

A. Yes, sir, when I got to Mr. Clark Mr. Kelly was there and he was looking over Mr. Clark and I said, "Let's pick him up," and he said, "Let him alone."

Q. Was he on the ground? A. Yes, sir.

Q. Lying down? A. No, sir.

Q. Leaning over?

A. Was leaning over looking white as a sheet.

Q. Did he say where he was hurt?

A. No, didn't know at the time where he was hurt

(Deposition of J. C. Gatti.)

but thought it was his hip.

Q. And you and Mr. Kelly assisted him to his house?

A. Yes, sir, for a little while and Mr. Kelly said he was tired and out of breath so I took him home.

[501] Q. Did he walk any way by himself?

A. With my assistance. We went as far as the wall and when we got to the wall he said to let him alone and he would go by himself.

Q. Did he? A. Yes, sir.

Q. Did you notice any bruises or marks on his face?

A. No, sir, all I noticed was that he did not walk very well and as we got there I noticed he walked into the house by himself.

Q. Did you see Mr. Clark after that?

A. No, did not see him for a long time after that, about two or three months.

Q. What was he doing then?

A. He went away and did not see him until he came back from California.

Q. Seem to walk around then? A. Yes, sir.

Q Walk around ever since?

A. Yes, sir, walking now.

Q. How far is Mr Clark's house from the place where the accident occurred?

A About 175, well, about 180 yards.

Q. It would be on the opposite side of the track from your place of business? Opposite the main line between **[502]** the Shannon switch and the main line? A. Yes, sir.

(Deposition of J. C. Gatti.)

Redirect Examination.

(By Mr. KEARNEY.)

Q. Did Mr. Kelly come there after the collision?

A. Mr. Kelly was there when I got there.

Q. Was he there afterwards?

A. Mr. Kelly got out of wind after we packed Mr. Clark, he must have gone 10 or 15 yards.

Q. Was Mr. Kelly there before the collision?

A. He must have been there, I positively know he was there when I got there.

Q. Do you know whether he was there before?

A. No, sir, when I got there he was there.

Q. When the collision occurred were you positive the cars were going up the Shannon line or coming down? A. Well, they were coming down.

Q. Was it a fact the engine was pushing those cars and going up Shannon and freight-cars going down and running north on the main line? Didn't see anything like that?

A. As I said before that these cars were moving. I didn't see any engine but Mr. Clark's engine and Mr. Clark was going up with his engine.

Q. The collision occurred by the cars being pushed [503] up the Shannon spur. They were going up to the Shannon Company on the Shannon spur. Do you know whether or not you saw the cars being pushed up the Shannon spur by the engine and the cars that were moving down the main line and that the collision occurred by the meeting of those cars coming north of the track and the engine going up the Shannon spur? I want to know whether you

(Deposition of J. C. Gatti.)
saw this or not?

Objected to by counsel for defendant as not being a question but a narrative of events.

A. I didn't see any engine pushing those cars that was. When I came out those cars were standing there and there was only one engine in sight at the time. The collision occurred right at the point of where the two tracks meet. The cars from the Shannon Hill collided with the engine and I saw two or three planks run right through his cabin. I can't say anything else only what I saw.

Q. When you first came out of your place of business could you see Mr. Clark's engine?

A. Not very well.

Q. Could you see it at all?

A. I could see the smoke but could not see the engine. When I ran I ran between the two tracks and that is where I saw him and Mr. Kelly was looking at him.

Q. Did Mr. Clark's position on that engine coming around that curve going south enable him to see the cars on the main line?

A. I don't know, of course I could not say to that [504] but I know that an engineer's place is on the right and when I picked him up he was on the left. His fireman, Jack, was trying to pull the boards out of there.

[Deposition of Rebeckah Manes.]

The deposition of REBECKAH MANES, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

My name is Rebeckah Manes; age, 32, and I reside at Metcalf, Ariz., and am employed as a housekeeper for my husband.

Q. What was your vocation on March 15th, 1911?

A. Called as a nurse to Mr. Clark.

Q. And you nursed Mr. Clark following his injuries on the railroad, of March 15, 1911?

A. Yes, Judge.

Q. What doctor treated him?

A. Dr. Dietrich.

Q. When were you called to nurse Mr. Clark?

A. Sixteenth of March, 1911.

Q. What experience have you had as a nurse?

A. Experience in medical, surgical nurse, hospital and outside practice.

[505] Q. Are you a graduate of any institution?

A. Sister's Hospital, Los Angeles, California.

Q. When you were called did you make an examination of Mr. Clark? A. What do you mean?

Q. In reference to the injuries he received?

A. Yes, sir; when I arrived in the morning Dr. Dietrich was there and he was examining Mr. Clark and of course, I looked on.

Q. He was examining Mr. Clark? A. Yes, sir.

Q. State, then, what was the condition of Mr. Clark.

(Deposition of Rebeckah Manes.)

A. At that time he didn't state all his injuries.

Q. Did you yourself make an examination of his injuries?

A. Yes, sir, I noticed there was some new injury that was not noticed the first day I was there.

Q. What was that?

A. Injury of the lung.

Q. What did the injury consist of?

A. To my knowledge it was a fracture.

Q. Of what? A. Of the ribs.

Q. What other injury?

A. Other injuries were (interrupted).

[506] Q. Any injury about the face or head?

A. The left eye was sore and injuries of the rib in the lumbar regions.

Q. And an injury to the left eye?

A. I don't know as it was an injury but his eye was sore.

Q. Old or fresh sore?

A. Fresh one to my knowledge.

Q. Did Dr. Dietrich at that time treat the eye?

A. Gave me instructions what to do.

Q. What did he tell you to do?

A. Bathe it frequently with boracic acid solution.

Q. How long did you give that treatment?

A. During the time I was there, a week.

Q. Did you make a discovery of any other physical injury?

A. No, not any more than the pneumonia that developed.

Q. When was that?

(Deposition of Rebeckah Manes.)

A. I am not positive what day it developed.

Q. In reference to the upper broken rib that you speak about, did Dr. Dietrich tell you about it first or did you tell him?

A. I drew Dr. Dietrich's attention first, to a discoloration on the skin over the lung.

[507] Q. How long afterwards was that? How long after the doctor had been treating, did you call his attention to that condition?

A. I presume the second or third day.

Q. And you kept a record of the temperature and every day's symptoms? A. Yes, sir.

Q. What do you call the record?

A. Clinical Chart or record sheet.

Q. For whose benefit did you keep that chart?

A. Doctors'.

Q. Each day you were there attending Mr. Clark, Dr. Dietrich called for that chart? A. Yes, sir.

Q. Did you show it to him?

A. Usually had it on the dresser and he picked it up and looked at it.

Q. Did Dr. Dietrich give you any instructions in reference to the care of Mr. Clark or say anything about his condition?

A. Said had to watch Mr. Clark very closely for his condition was very serious, pneumonia developing with other injuries would prove fatal possibly.

Q. Can you state further anything that occurred?

A. Why, there were several instructions he gave, that is in regard to the seriousness of his condition.

Q. Basing your opinion upon your experience as a

(Deposition of Rebeckah Manes.)

[508] nurse and from your observation and examination of the physical condition of Mr. Clark, would you say that his injuries of which he was suffering and of which you were attending and treating as a nurse, were slight or of a serious nature?

Objected to by counsel for defendant on the grounds that witness has not qualified as an expert and second, as not a question of opinion.

A. Serious.

Q. Why do you say that they were serious? What is your reason?

Objected to by counsel for defendant on same grounds.

A. Owing to the several injuries Mr. Clark received and afterwards developing into pneumonia.

Q. At the time you were nurse what was his diet?

A. Liquid and soft diet.

Q. Why were they given?

A. Because his condition was so that solid food would be injurious to him.

Q. You took his temperature? A. Yes, sir.

Q. Was the temperature of Mr. Clark taken by Dr. Dietrich?

A. Yes, sir, while I was not there during his first visit.

Q. You was not there?

A. I was there the morning of the 16th.

[509] Q. Dr. Dietrich took the temperature of Mr. Clark at that time? A. I presume he did.

Q. Do you know whether any request was made for specimens for examination?

(Deposition of Rebeckah Manes.)

A. I don't remember.

Q. What is your recollection?

A. No no specimens were called for but it seems to me they saved some specimens for Dr. Dietrich.

Q. Did he get them?

A. Yes, sir, I think so. Mrs. Clark was ill at the time.

Q. Did you room awhile in the house of the plaintiff in this action?

A. Roomed and boarded eight months with Mr. and Mrs. Clark.

Q. Covering what period of time?

A. From November until the following April.

Q. What year was that? A. 1900, I believe.

Q. Was that a year before this accident or more?

A. Two years.

Q. State when you were there if Mr. Clark read a good deal.

A. Yes, he read a great deal when I was there.

Q. Plaintiff read a good deal at night?

[510] A. Did most of his reading at night, to my knowledge.

Q. Use glasses? A. Yes, Judge.

Q. This is your clinical report? (Produces report.) Did you make this from actual observation?

A. Yes, sir.

Cross-examination.

(By McFARLAND and HAMPTON.)

Q. Did you not see Mr. Clark until the second day after the accident? A. No, Judge.

Q. Where was he when you first saw him?

(Deposition of Rebeckah Manes.)

A. At his home, in bed.

Q. In Clifton? A. Yes, sir.

Q. What time of day did you go down?

[511] A. Down from Metcalf on the morning train, a little after nine, I should think.

Q. About nine o'clock? A. Yes, Judge.

Q. Was Dr. Dietrich there when you went in?

A. Yes, sir.

Q. He had seen him previous??

A. Yes, Judge.

Q. Did he complain of his wounds the first day you were there? A. Yes, Judge.

Q. Of what particular wounds did he complain?

A. Of the injured hip and up here (indicating the chest).

Q. Injury developed by pneumonia in the apex?

A. Yes, sir.

Q. Did you notice that the first day you saw him?

A. Did not notice this over the lung.

Q. Did you know whether Dr. Dietrich had noticed this before? A. He didn't; no.

Q. Mr. Clark was perfectly rational?

A. Yes, Judge.

Q. You would consider one with wounds he had from this accident with indications of pneumonia pretty serious case with anybody, wouldn't you?

A. Most always.

[512] Q. Would it be more serious with him than anybody else?

A. If they had injuries it would be.

Q. A serious condition? A. Yes, sir.

(Deposition of Rebeckah Manes.)

Q. There was a little inflammation in one eye?

A. Yes, sir.

Q. On the ball of the eye?

A. It seemed to be in the iris, the white part.

Q. It was inflamed in general?

A. Never made a thorough examination to find out.

Q. Just a little inflammation in his eye?

A. Yes, Judge.

Q. Find some pus? A. Yes, sir.

Q. Did the doctor say to wipe that out?

A. Said to bathe it.

Q. And you did? A. Yes, sir.

Q. How long were you attending upon him as a nurse? A. One week.

Q. You mean by that seven or eight days?

A. Seven days.

Q. Went on the second day after the accident and stayed seven days? A. Yes, sir.

[513] Q. Then you were with him eight days after the accident including the first day of the accident? A. Yes, sir, it would be eight days.

Q. Did Mr. Clark complain particularly any pain in his eye?

A. No, not in particular about the pain.

Q. He had a bad cold, hadn't he?

A. Don't know whether you would call, he had a cough a great deal.

Q. Had you in your experience seen persons have a serious inflammation of the eye?

A. Not a cold like that.

(Deposition of Rebeckah Manes.)

Q. What particular kind of a cold would have that effect on the eye? A. I don't know.

Q. You have seen people's eyes inflamed with a bad cold? A. Yes, there are lots of reasons.

Q. Dirt might have caused the eye to be in that condition? A. It might.

Q. Did Mr. Clark during the time you were there complain of any loss of vision in that eye?

A. Not to me.

Q. Did he read any during your time as a nurse?

A. Yes, sir.

[514] Q. Read every night?

A. No, Judge; last couple of days I was there.

Q. Lying in bed reading?

A. Propped up in bed.

Q. Made no complaints at all of loss of vision in his eye to you? A. No, Judge.

Q. Did Dr. Dietrich attend him every day while you were there? A. With the exception of one.

Q. Dr. Smith there?

A. Dr. Smith attended during Dr. Dietrich's absence.

Q. One day? A. Yes, sir.

Q. How long did he read at a time during the later part of your attendance as a nurse?

A. Probably 25 or 30 minutes.

Q. Read at different intervals during the day?

A. Not that I remember. About once a day.

Q. Use his glasses? A. Yes, sir.

Q. What was his condition when you left him?

A. He was very much improved.

(Deposition of Rebeckah Manes.)

Q. Was he up?

A. Sat up on a chair one day for thirty minutes.

Q. As a matter of fact, he didn't have pneumonia?

A. Didn't have, he did have pneumonia.

[515] Q. A complete case of pneumonia?

A. Yes, sir.

Q. Both lungs?

A. I don't know as both lungs were involved. I have forgotten, but I think there were.

Q. Entire lung or only a portion?

A. Entire, entire lungs were involved.

Q. Doctor treated him for that? A. Yes, sir.

Q. For his wounds? A. Yes, sir.

Q. And he was able to sit up the eighth day after he was in this accident, you say, about thirty minutes? A. Yes, sir.

Q. See him after that? A. Did I see him?

Q. I mean recently afterwards.

A. Yes, sir; I saw him in the course of a few weeks.

Q. Was he out then?

A. Had been up and down at intervals.

Q. Had been out of the house, do you know?

A. I don't know.

Q. Saw him in his house, did you? A. Yes, sir.

Q. How long were you there when you first saw him afterwards?

A. I don't remember what date I saw him. I know it [516] wasn't very long after I left there.

Q. He was up and around? A. I don't know.

Q. He appears to be up now, you see him standing

(Deposition of Rebeckah Manes.)
up there by you, don't you? A. Yes, sir.

Q. Mrs. Clark was sick at the time, wasn't she?

A. Yes, sir.

Q. Did you attend her as a nurse also?

A. I did.

Q. What was the condition of this eye when you left Mr. Clark as a nurse?

A. When I left him he was a little improved.

Q. Still some inflammation?

A. Yes, sir; I remember telling Mrs. Clark to continue the bathing after I left.

Q. You say the white part of the eye was a little bloodshot?

A. Well, I don't remember if it was bloodshot. At the time I did not pay very strict attention as the other injuries were so strictly severe.

Redirect Examination.

Q. Was it the injuries he received in this wreck or collision that brought about the condition of pneumonia? A. Yes, sir.

[517] Q. He was internally conservatively injured by the accident? A. Yes, sir.

Q. This injury induced inflammation and brought about pneumonia? A. Yes, sir.

Q. What was the condition of Mr. Clark's right eye during the time you were nurse to him?

A. I presume it was all right.

Q. The right eye during the time you were nursing him appeared to be normal?

A. It appeared that way to me.

Q. You didn't observe that the right eye was

(Deposition of Rebeckah Manes.)

inflammed nor in any way injured?

A. Not that I remember. I may have bathed both éyes when I was bathing the eye that was injured.

Q. Towards that last of your nursing did you observe anything wrong with the right eye?

A. No, Judge.

Q. What would cause pneumonia?

A. If there is a pressure over the lung.

Q. Is that the usual reason, the pressure over the lung? A. I don't know.

Q. Did you ever treat a case of pneumonia?

A. Yes, sir.

Q. Well, now, his left was normal, wasn't it, except [518] this inflammation?

A. Well, as I stated before, I did not examine his eye, until the trouble came up and the doctor told me to bathe his eye.

Q. All you noticed about that eye was some inflammation? A. Yes, sir.

Q. On the front of the eye?

A. I have forgotten whether it was or what part. Only the eye was sore.

Q. And a little pus in it and you treated that eye under the direction of Dr. Dietrich? A. Yes, sir.

Q. No complaint from Mr. Clark, except that eye was sore? A. Yes, sir.

[Deposition of Ross Thomas.]

The deposition of ROSS THOMAS, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

My name is Ross Thomas; age, 33, and I reside at Clifton, Arizona, and am employed as a locomotive engineer.

Q. You know the plaintiff, T. B. Clark?

A. Yes, sir.

[519] Q. How long have you known him?

A. Something like ten years.

Q. Where did you know him?

A. Clifton, Arizona.

Q. What has been his business during that time?

A. Locomotive engineer.

Q. In whose services has he been?

A. A. & N. M. Railway Company.

Q. Is that the defendant in this case the A. & N. M. Railway Company?

A. The defendant in this action is the A. & N. M. Railway Company.

Q. Is that the company to which you refer?

A. Yes, sir.

Q. Are you in the employ of the defendants company? A. Yes, sir.

Q. How long have you been in the employ of the defendant?

A. Nine or ten years, I couldn't say positively.

Q. Has your employment been continuous?

A. Yes, sir.

(Deposition of Ross Thomas.)

Q. During that time you have been employed as locomotive engineer?

A. No, sir; I was employed as fireman, also as hostler.

[520] Q. Is that all the service of the defendant?

A. Yes, sir.

Q. Are you acquainted with that piece of track of the defendant running from the depot in Clifton, Arizona, down to the railway bridge of defendants that crosses the San Francisco river in the town of Clifton? A. Yes, sir.

Q. Do you know where the Shannon switch is?

A. Yes, sir.

Q. State what this switch is.

A. Well, it is a switch leading to the Shannon Smelter.

Q. What is the length of this switch?

A. Where, from the Shannon to—

Q. Shannon switch to Shannon Copper Company's Smelter.

A. Well, I couldn't say. It is less than a mile.

Q. From the Shannon switch to the railroad bridge that crosses the San Francisco River in the town of Clifton, you say you know that track. About what length is that piece of road?

A. From Shannon switch to bridge? Well, I could not say. We suppose fifteen car lengths as we would call them.

Q. You know the piece of road of the defendant? I mean the railroad between the Shannon switch and the wagon road that crossed the railroad about 400

(Deposition of Ross Thomas.)

feet below [521] there. A. Yes, sir.

Q. How long have you known that piece of road?

A. Ever since I have worked there.

Q. Eight or nine years?

A. Well, I should say seven years, because I haven't worked there. The first work I did was on the Coronado Road.

Q. That road we just mentioned, lying between the wagon road that crosses the railroad and the Shannon switch, is that on an inclining grade?

A. Yes, sir.

Q. What direction is the grade inclined?

A. Well, the grade is inclined towards the wagon road and it crosses there at the railroad.

Q. Inclined towards north or south?

A. Inclines to the north. I don't know the direction, don't know north, south, east or west. It seems like north to me, but is a northerly direction.

Q. The incline is lower from that road to the switch? It is lower than it is further down?

A. It is lower from the Shannon store to end of bridge this way than at the bridge. It is lower this way towards the Shannon switch.

Q. You know whether cars being placed on that part of the track would remain without the brakes having been set?

[522] A. Sometimes they would and sometimes they would not. Just depends if the cars were stopped dead still, they would stand there and sometimes they wouldn't stand. It depends on the jar of the wind and circumstances. We are always very

(Deposition of Ross Thomas.)

particular to see that the cars were always stopped perfectly still.

Q. Have you noticed cars roll on that part of the track without having been blocked would roll away?

A. Yes, sir.

Q. How many times?

A. Twice that I know that they rolled any distance. A number of times I have seen them start off, but I know of several times they would run quite a distance after we got up over the switch. A great many times I noticed they would roll down after we got off, but we would stop them again.

Q. You know of quite a number of times the cars on the track having been left on that part, part of the time between the bridge and Shannon switch, cars would roll. Would they roll towards the direction of Clifton or the bridge?

A. Toward Clifton.

Q. You know of that quite often, do you?

A. Not every day, but we were always very careful that they were stopped perfectly still and sometimes they would roll and sometimes they wouldn't; never made a practice of rolling every time we stopped them.

[523] Q. Did you say that as often as once a month you knew they would roll?

A. No, I couldn't say that they would roll as often as once a month, because we never paid any particular attention, only we knew that they would roll very easily. We always took caution that we stopped them perfectly still.

(Deposition of Ross Thomas.)

Q. How frequently would you say?

A. In the summer time they would roll easier than in winter. Maybe twice every two months they would move on us, but we never paid any attention to it.

Q. You say during the time, this seven or eight years, you know of twice each month, if freight-cars left standing on that part of the track they would run north?

A. I have not worked on that engine, remember, all the time in this number of years—I have worked here. I have only worked on the engine, I couldn't say how long, but the longest length of time was one straight year, but having been off and on there all the time since. I guess I have run the engine more than any one man besides Mr. Clark. After that I worked in the yard here, but haven't run the engine any seven or eight years, that is that particular engine.

Q. Well, on that particular piece of track from base of Shannon switch to the railway bridge, about how often have you been over that every day during the past seven or eight years?

[524] A. How often? How many times, you mean? Well, no, because I have not been over it every day. Some days have been over it every day, and sometimes I was working on the Coronado Railway and was not out of here at all.

Q. Would you say, then, once a week?

A. Well, I wouldn't say. There are lots of weeks I wasn't over the tracks at all as I was confined to

(Deposition of Ross Thomas.)

the other road. But when I was working on the A. & N. M. I was on the switch engine and was over it a number of times a day. But on another engine was over it possibly twice a day.

Q. When you were running over that part of the road was Mr. Kline with you?

A. He was when he was on the switch engine.

Q. When was that? What year?

A. Couldn't say the year, but it must have been in 1909 or 1908.

Q. Mr. Kline was with you then?

A. Yes, sir, he was in the yards, then. But I worked with Mr. Kline when he was conductor here, several years ago. I ran over that part of the road.

Q. Was Mr. Kline with you at the time when the cars of that piece of track from the Shannon switch to the railway bridge—(interrupted.)

Objected to and I want to object to all this testimony as to the cars rolling or the number of times they rolled at any other time than at the date of the accident. [525] Because of being irrelevant and immaterial. No allegation in the complaint as to the cars rolling at any other time other than at the date of the accident.

Q. Do you know whether or not Mr. J. M. Kline, brakeman, employee of the defendant, knew that the cars set out on the track of the defendant, between Shannon switch and the railroad bridge crossing the San Francisco River, in the town of Clifton, would remain on that part of the track without the brakes having been set or the same blocked?

(Deposition of Ross Thomas.)

Objected to on the ground as irrelevant and immaterial. Does not tend to support any issue raised by the opinion in this case.

A. I don't know whether he does or not. I couldn't say. He certainly did, I guess.

Q. Was he present at any time when the cars would run on that track?

Objected to as irrelevant and immaterial.

A. Yes, I guess he was. He has worked with us all the time; he surely must have been.

Q. Times you speak about, the cars left on the track without the brakes having been set would run, at any of these times was Mr. Kline with you as a servant of the defendant?

Objected to by counsel for the defendant for the same reason.

A. Yes, sir.

[526] Q. Then Mr. Kline was with you some of those times you speak about, the cars having run on that piece of track without the brakes having been set? A. Yes, sir, was with us.

Objected to by the counsel for the defendant as irrelevant and immaterial.

A. Was with the engine all the time, except when he is yardmaster, he is always with the engine.

Q. So you will say that Mr. Kline was present when cars left on the track without the brakes having been set did run? A. Yes, sir.

Objected to by counsel for the defendant for the same reason.

Q. Can you state about what time this was?

(Deposition of Ross Thomas.)

A. Well, I could not state definitely the exact time. I have a record at home. I can tell you every day I have worked. But I could not tell you now the exact day, date or month I have worked on that engine; my memory isn't that good.

Q. Could you tell the year?

A. It's about 1909, I judge.

Q. Was that part of the track during the year 1909, 1910 and 1911, in practically the same condition? A. Yes, sir.

[527] Q. Remember, that piece that I am asking about was the same, was that piece lying between the Shannon switch and the railway bridge we mentioned, was it during the years 1909, 1910, 1911, in about the same condition all the while during that period? A. Yes, sir.

Q. Covering the years 1910 and 1912 was John Kelly in the service of the defendant?

A. Yes sir.

Q. What position did he hold?

A. Yardmaster.

Q. During those years, I mean from 1909 to 1912, was he yardmaster? A. Yes, sir.

Q. State whether or not yardmaster Kelly knew that cars placed or left on this piece of track between the Shannon switch and the railroad bridge without the same having been blocked or brakes set thereon, would remain on that part of the track.

Objected to by the counsel for the defendant on the same ground as irrelevant and immaterial, and it calls *financier* from the witness of his knowledge of a

(Deposition of Ross Thomas.)
matter that is personal to the party inquired about.

A. Well, I couldn't say.

Q. Did you ever talk to Mr. Kelly about cars running away on that part of the track?

[528] Objected to by the counsel for the defendant for the reason that Mr. Kelly is not a party to this action.

A. No, sir.

Q. Mr. Kelly ever speak to you about cars running on that part of the track without the brakes having been set?

Objected to by the counsel for the defendant as irrelevant and immaterial.

A. Mr. Kelly says very little to the engine men.

Q. Was Mr. Kelly present at any time when the cars did run on that part of the track?

A. I could not say.

Q. Do you know whether he was present at any time when cars would run on that part of the track?

A. I do not know.

Q. Was he an employee of the defendant along with you as part of the crew of that switch engine?

A. He is an employee, but he is not always with the engine, very seldom.

Q. Does he have anything to do with the cutting off of cars or the moving of the cars, making up the trains, giving orders to be set out on any part of the track?

Objected to by counsel for the defendant. Unless the witness can testify from your personal knowledge what the duties of Mr. Kelly as yardmaster are.

(Deposition of Ross Thomas.)

A. He is the man that under whose orders the engine works.

[529] Q. Then it is he who gives out orders and makes up the trains? A. Yes, sir.

Q. Then when cars are set out on the tracks and on this particular piece of track, from the Shannon switch to the railway bridge, we have talked about, it was the duty of Mr. Kelly to direct the movement of those cars.

A. These men are under his instructions.

Q. Then he does give the direction for the movement of such cars? A. Yes, sir.

Q. When cars are set out and removed, he is usually present, is he not? A. Not all the time; no.

Q. Half of the time?

A. No, sir, I could not say that he was.

Q. Is he present one-tenth of the time?

A. Yes, I should say so.

Q. Could you say more?

A. Well, sometimes he is present possibly three or four hours; sometimes he is only around the engine an hour.

Q. How long has Mr. Kelly been in the employ of the defendant? A. I don't know.

Q. Do you know whether he has been employed at all—one day or one month? [530] A. Yes, sir.

Q. About how much time?

A. Well, he has been employed about 8 or 9 years, to my knowledge, in this yard.

Q. You mean the yard of the defendant, at Clinton, Arizona? A. Yes, sir.

(Deposition of Ross Thomas.)

I move that all of the answers of the witness in reference to the switch, the number of times cars have run and the several occasions be stricken out, for the reason that the same is irrelevant and immaterial, and for the reason that there is no allegations in the complaint under which such testimony would be competent or irrelevant.

Cross-examination.

(By Mr. McFARLAND.)

Q. How long do you say you have known Mr. Clark? A. For the past ten or eleven years.

Q. Did you know him previous to his coming to Clifton? A. No, sir.

Q. Have you ever worked with him?

A. Yes, sir.

Q. In what capacity? A. Locomotive fireman.

Q. How long a period did that cover?

A. Well, I haven't worked for Clark for several years, [531] but it was not regular.

Q. You were both in the service of the A. & N. M. R. R.? A. Yes, sir.

Q. What were you doing during the time you associated with him?

A. I was locomotive fireman.

Q. What was he doing?

A. Running the engine?

Q. Were you and he fireman and engineer on the same engine? A. Yes.

Q. How long a time did this association cover?

A. Well, more or less for a year.

Q. How was the engine engaged during this time?

(Deposition of Ross Thomas.)

A. Freight service and also a little passenger service.

Q. Did you ever work with him on the switch engine? A. No, sir.

Q. State as near as you can the year you associated with him as fireman.

A. About 1904 or 1905.

Q. During that period did he usually observe the signals given him? A. Yes, sir, very closely.

Q. Never failed to obey signals during that period? [532] No, sir.

Q. Did you ever hear any complaint during the period covered by your association with him that he failed to obey signals? A. No.

Q. Did you covering that period hear any complaint of the brakeman? A. No, sir.

Q. That he ever failed to observe or obey signals?

A. Not while I worked with him.

Q. Did you hear any complaint of the brakemen either or subsequent time that he failed to observe or obey signals? A. No, sir.

Q. Isn't it a fact that it was a constant complaint of the brakemen on the trains of which he was the engineer that he universally either failed to observe or obey signals?

A. Not while I worked with him.

Q. Nor at any time before or since?

A. O, I've heard complaint, but not while I worked with him; there was no complaint whatever while I worked with him.

Q. But you say you have heard before and after?

(Deposition of Ross Thomas.)

A. No, sir, not before; I have heard switchmen complain but paid no attention to it as they complain about every man so far as that is concerned.

Q. How many switchmen have you heard complain since [533] your association with him as fireman.

A. I couldn't say; that is something we never pay any attention to.

Q. But you have since that time frequently heard complaint that he had disobeyed or disregarded signals? A. No.

Q. Then why do you say that you heard these complaints and paid no attention to them?

A. Because it's something that happens most every day in the yards.

Q. You say there is a downgrade between the north end of the bridge and the point where the Shannon switch intersects with the main line of the road? A. Yes.

Q. Do you know what that grade is?

A. If you mean what the per cent grade is, I do not.

Q. Suppose it's one-eighth or one-fourth per cent, would be a freight-car standing still move of its own volition at any point between the north end of the bridge and the point where the Shannon switch intersects with the main line?

A. That depends on circumstances; if it were in the heat of the day when the oil in the boxes was hot, it might roll; if it was winter time and the boxes were frozen up, I guess it wouldn't roll.

(Deposition of Ross Thomas.)

Q. Now, suppose that the cars loaded with freight had only been moved on the day of the accident not more [534] than a mile, what would you say then about a car that had been stopped moving on the grade between the switch and the frog where the Shannon switch intersects with the main line?

A. Well, if it was stopped perfectly still, the wind not blowing, and no jar, it possibly might stand, if only the one car.

Q. What difference if it was only one car or more?

A. The heavier the load on the grade the heavier it is to hold.

Q. Would it make any difference on a straight or a curve? A. Yes, sir.

Q. What would be the difference?

A. Well, it depends on the degree of the curve, the sharper the curve, the harder the car binds, on a straight track the car rolls free.

Q. Then you would say that a car loaded would be more liable to start on a straight track than it would on a curve? A. Yes, sir.

Q. Do you mean by that, without any reference to the degree of the curve?

A. Well, I mean that a car will roll on a straight track easier than on a curve; the sharper the curve the harder it is to get around, bind more on a curve than on a straight track.

[535] Q. Were you ever connected with a crew that was engaged in switching cars at that point?

A. Yes, sir.

Q. What was the method you used in switching cars from the main line up the Shannon switch?

(Deposition of Ross Thomas.)

A. You mean the cars that were to go up the Shannon hill, do you not? Well, they were stopped on the main line below the Shannon switch and cut off from three to six at a time, we taking up as many as we could at a time, sometimes we had twenty, sometimes ten and sometimes seven or eight.

Q. What was the method you used in respect to the cars that remained on the main line after you had cut off a part and switched them up the Shannon hill?

A. Well, they were just simply stopped on the main line, and as long as they were stopped perfectly still, we let them stand there till they were all up, and if they wouldn't stand, we used sticks or rocks.

Q. You have had a lot of experience in railroading? A. About ten years.

Q. In different capacities? A. Yes, sir.

Q. You consider that a careful way to handle a train of loaded cars on that grade between the Shannon switch and the bridge?

[536] A. I don't consider that it's the safest way but it's the way that it's been practiced here more or less.

Q. Did you consider that a reasonably safe way to switch?

A. Well, yes, we didn't consider that we were in any great danger.

Q. Was that the method adopted by the train crew while Mr. Clark had charge of the engine?

A. I couldn't say. I wasn't on the engine while

(Deposition of Ross Thomas.)

he was in the yards.

Q. So far as you know, tho, that has been the method adopted up to this time for switching cars between the Shannon switch and the bridge?

A. That is, up till the time they put in the block system.

Q. You say Mr. Kelly is the yardmaster and has been for six or seven years past? A. Yes, sir.

Q. And you say that he directs the movement of the cars in the yard? A. No, sir.

Q. He doesn't direct you as to the detail or, in other words, how you shall move the cars, or the manner in which the switching is to be done?

A. No, sir; he has an engineer foreman who takes orders from him, and he is the man that the crew works under. Foreman simply directs the movement of the cars [537] but as to the details or the particular manner in which this is to be done is left to the judgment of the crew by the foreman.

Q. Then Mr. Kelly has nothing to do with the details of the work or the switching of the engine, but that is a matter exclusively in the hands of the engine foreman?

A. He isn't personally with the engine all the time, but he is the man who is with the cars all the time; he directs the crew and he is the man who is responsible for the crew, is my opinion.

Q. Do you allude to the fireman as the engine foreman? A. No, sir, he is the switchman.

Q. Then I understand you to say that Mr. Kelly has nothing to do with the details of the switching,

(Deposition of Ross Thomas.)

does not direct how it shall be done, simply orders or directs in a general way that certain cars be switched or placed at certain points, and the manner of doing it, in fact all the details are directed and controlled by the engine foreman? A. Yes, sir.

Q. Is Mr. Clark familiar with the details of the work in switching in the yards?

A. So far as I know he is.

Q. Is he familiar with the details as used as you have testified in taking cars from the main line up the Shannon hill?

[538] A. As far as I know.

Q. Were those methods used that you have testified to while Mr. Clark had charge of the switch engine in switching cars up the Shannon hill?

A. I couldn't say. I wasn't with him while in the yards.

Q. Then you were never around or about him while he was engineer on the switch engine?

A. I never worked with him in the yards.

Q. Then during your entire acquaintance with Mr. Clark you never saw him nor were with him or about him while he had charge of the switch engine in the yards?

A. Only as to get on, maybe to ride up to the round-house, or happened to get on when the engine was going the same direction I was, or something like that.

Q. Now, that is the extent of your acquaintance and association with him during the whole time he had charge of the switch engine? A. Yes.

(Deposition of Ross Thomas.)

Q. Never saw him switch cars?

A. O, I saw him switch cars as he passed along the road. I saw him many times a day, as I was working on the road.

Q. What would he be doing those times?

A. He was usually looking in the direction he was going, handling the engine. I couldn't say just exactly what he was doing, but that is what a man has to do when [539] he is on an engine.

Q. Then you did see him operating the engine in the yards?

A. O, yes; I've seen him operating in the yards.

Q. Did you ever see him switch cars?

A. Yes, sir.

Q. Did you see Mr. Clark at any time while he was suffering from injuries received in this accident?

A. No, sir; I have never seen Clark only as I've seen him on the street after he was able to be around.

Q. Had any recent conversation with him?

A. That depends.

Q. On the subject of this accident? A. No, sir.

Q. Then you have never had any conversation with him on that subject? A. No, sir.

Q. Did you know that you were going to be a witness in this case?

A. No, sir; he came and gave me a letter while I was eating lunch in the roundhouse.

Q. Have you ever talked with anybody about this accident?

A. O, talked with the railroad men here.

(Deposition of Ross Thomas.)

Q. But never had any conversation with him on the subject?

A. I asked how it happened just as friends would, [540] but never went into any details. I didn't consider it any of my business, so I didn't ask him; he simply told me how he was getting along as a friend.

Q. Did he describe his injuries to you?

A. Yes, sir.

Q. Say he was getting along all right?

A. O, able to get around but felt the effects of it.

Redirect Examination.

(By Mr. KEARNEY.)

Q. Did you say that you worked with Mr. Clark about two years?

A. Off and on for about two years; not two years straight.

Q. Were you firing for Mr. Clark? A. Yes, sir.

Q. When freight-cars are set out on the track do the rules of the company require the brakes to be set on them?

A. Yes, according to the rules; that is, any place of danger.

Q. Don't they require on all grades brakes to be set?

A. Well, that is the sum and substance of it.

Q. To avoid any accident by cars running, ought that not to be done?

A. Yes, sir; that is the safest.

Cross-examination.

Q. Do not the rules provide that no engine shall

(Deposition of Ross Thomas.)

be detached from a train until the train is brought to a stand-still?

[541] A. Yes; but it doesn't include yard service.

Q. Is that fact or opinion? A. Fact.

Q. You have a copy of the rules and are familiar with them? A. Yes, sir.

Q. And don't the rules further provide that no engine or with any number of cars detached from the train shall be moved unless the train has been brought to a standstill and the brake set on the cars remaining?

A. If it's on a grade; on any level track it will remain standing.

Q. Do the rules say anything about grades or danger? A. Yes, sir.

Q. Don't the rules say in all cases that before an engine is detached from a train either with or without cars composing a part of a train that the train shall come to a standstill, and the brakes set on the cars remaining?

A. Yes; if it is a place of danger.

Q. If these rules had been observed in this particular instance by the trainmen, would this accident have happened? A. No, sir.

Q. All those employees had a book of rules?

A. Haven't had a book of rules for years.

Q. You don't feel very kindly to the management of the road, do you?

A. I have no hard feelings toward them at all; they **[542]** have always treated me very nicely.

(Deposition of Ross Thomas.)

Q. You had no difficulty in getting a book of rules, did you?

A. No, sir; they gave it to me when I asked for it.

Q. This is the first accident that has happened to an employee of the company as the result of switching cars from the main line up the Shannon Hill covering the period that you have been employed in the company? A. Yes, sir.

Q. And the method of switching has been the same, so far as you know during this time?

A. Yes, sir.

[Deposition of W. H. Parker.]

The deposition of W. H. PARKER, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

Q. What is your name? A. W. H. Parker.

Q. What is your age? A. 37.

Q. Place of residence?

[543] A. Clifton, Arizona.

Q. Occupation? A. Section foreman.

Q. Mr. Parker, how many years have you been railroading? A. 14 years.

Q. What capacity? A. Track department.

Q. What position do you hold now?

A. Section foreman in the yards.

Q. That is for the defendant? A. Yes.

Q. Mr. Parker, are you acquainted with that piece of track on the defendant's railroad lying between the Shannon switch and the railroad bridge which

(Deposition of W. H. Parker.)

crosses the San Francisco River, in the town of Clifton, Greenlee County, Arizona? A. Yes, sir.

Q. How long have you been acquainted with that piece of track? A. Something over two years.

Q. During that time, have you had charge of that part of the defendant's railroad? A. Yes, sir.

Q. Covering that period has the grade and condition of the track been the same?

A. It has up to—I don't remember when it was; it was eight or ten months ago I raised the track through there.

[544] Q. What portion of the track did you raise?

Objected to by the counsel for the defendant, because of condition of the track since the accident.

The attorney for the plaintiff states the object of the testimony is for the purpose of arriving at the grade and determining what it was before the accident.

Counsel for the defendant objects to the evidence offered by the plaintiff because the proposed evidence would not show or tend to show the grade of that part of the track at the date, or before the accident.

A. I began, I suppose, about two hundred feet this side of the Shannon switch and ran my raise out to the crossing.

Q. As I understand, you began the point of the raise of your track about two hundred feet north of the Shannon switch, and from that point south to the wagon road, crossing near the Shannon store?

(Deposition of W. H. Parker.)

A. Yes, sir; somewhere about there. I don't know exactly; about two hundred feet, I suppose.

Q. Tell us fully what height you raised that part of the track.

A. Well, I supposed I raised it all the way from six to twelve inches. I don't know exactly.

Q. What point was the least and what the greatest raise?

A. The least I don't know, and the greatest was twelve inches.

Q. At what point was the greatest raise?

[545] A. It was towards the road crossing from the switch.

Q. The point where you made the greatest raise was near the switch? A. Yes, sir.

Q. Did the raise taper from the Shannon switch on towards the crossing?

A. The frog was in a sag from three to four rail lengths even from the Shannon crossing.

Q. Did you take measurements of the grade of that portion of the track which was raised?

A. No, sir; I never measured it, but I had the track man take a notch board, and I couldn't say just how high I put it but it was somewhere around twelve inches.

Q. Do you know how far it is from the Shannon switch to the road crossing?

A. No, sir; I never measured it.

Q. Did you find that portion of the track to be of an inclined grade?

A. Yes, sir; it is downgrade from the Shannon

(Deposition of W. H. Parker.)

road crossing to the Shannon switch.

Q. How much lower was the Shannon switch than the road crossing?

A. It was between ten and twelve inches or more. I raised this switch even with the Shannon road crossing and got it level.

Q. Do I *understand to* say that you have had eight or ten years' experience with railroads?

A. Yes, soon to be fourteen years.

[546] Q. I'll ask you your opinion. Was the grade on that portion of the road which you state that you raised, of so much incline that cars set out thereon would not remain without the brakes having been set or the same securely blocked to keep from running?

Objected to by counsel for the defendant, for reason that the witness has not qualified as expert on these lines.

A. Yes, I consider it was.

Q. Then you would say from your experience with railroad tracks for the period of fourteen years that you would regard it as unsafe to leave cars on the portion of the track that you raised without the brakes having been set to the same?

Yes, sir, I would consider it unsafe.

Cross-examination.

(By Mr. McFARLAND.)

Q. How long have you been in employ with the Arizona & New Mexico R. R.?

A. Since November, 1909.

Q. In what capacity? A. Section foreman.

(Deposition of W. H. Parker.)

Q. What other roads have you worked for?

A. Illinois Central.

Q. Where and when?

A. Oakland, Mississippi.

Q. What capacity,

A. First laborer, then section foreman, 1898.

[547] Q. Where did you next work?

A. Water Valley, Miss. Same system, Ill. Central.

Q. Covering what time?

A. From, I believe, March or April, 1899, till the following December in the same year.

Q. That section foreman? A. Yes, sir.

Q. Where next?

A. Yazoo, Miss. Valley, on Sunflower District, headquarters Tutweiler, same capacity.

Q. Just go ahead with the different places and what you did.

A. I remained on that gang until 1902, then at Bellzonia, Miss. I stayed there until Nov. of the same year, and went to braking out of Memphis, Tenn., on the same road. Stayed there till September, 1903, then went to Benoit, Miss., as section foreman of the Vicksburg division, same road, and remained there till 1905, in February. Went from there to Mansfield, Louisiana; worked for the Kansas City Southern, as section foreman, till October 20, 1909. Then came here.

Q. Have you ever had any experience in construction of railroad beds? A. Yes, sir.

(Deposition of W. H. Parker.)

Q. How much experience have you had in that line?

A. Not so very much. I have laid a great deal of steel on new grades and leveled them up.

Q. Do you know the grade of that roadbed from the crossing [548] in front of the Shannon store down to where the Shannon switch, after you completed your work on this line?

A. I raised the frog of that switch to the same height as the Shannon crossing.

Q. Do you mean down at the switch?

A. Yes, sir, the whole switch something like two hundred feet north of the switch, and pulled up to the switch then from there to the crossing.

Q. Then the roadbed from two hundred feet north of the Shannon switch to the point where the wagon road crosses the roadbed in front of the Shannon store was absolutely level when you completed the work you say you did on the roadbed after this accident?

A. I raised it with a jack to that crossing and put this new dirt under it, but the first train that passed over, was liable to settle it.

Q. What is the difference between the grade now and immediately after you completed your work, after the accident?

A. I don't know, sir, really, but I suppose it had settled some. I never did give it a second raise.

Q. You do not know what the grade is now, do you?

A. No, sir, I do not.

Q. You do not know what the grade was before the

(Deposition of W. H. Parker.)

accident? A. No, sir.

Q. All you know is that you raised the grade at some points along the line, but there was no uniform grade?

[549] A. I couldn't say whether uniform or not, but I know that the Shannon frog had what is called a sag in it.

Q. How much was that sag?

A. Highest place something like ten or twelve inches.

Q. Did the grade incline north from the Shannon switch and south from the crossing?

A. Yes, sir, I think it did, because I started north of the switch with my raise.

Q. Then the lowest place would be about halfway between these points?

A. No, sir; I wouldn't say whether it was or not, because I don't remember. The reason I know that the frog was raised ten or twelve inches, I had to pull three or four rails on the Shannon hill switch, then left a dip on that switch.

Q. What do you understand by a one per cent grade?

A. A one per cent grade is one foot per hundred feet.

Q. Now, was there any place beginning two hundred feet this side of the Shannon switch extending to where the road crossed the roadbed in front of the Shannon store, where there was as much as one per cent grade before you repaired the roadbed?

A. Not paying much attention to the track at the

(Deposition of W. H. Parker.)

time I couldn't say exactly.

Q. Was there any place between these points where there was one-half of one per cent?

A. Yes, it was that or more.

Q. That is you were positive of it?

[550] A. Yes, sir.

Q. What is the steepest grade between points two hundred feet this side of the Shannon switch and the wagon crossing? A. I don't know.

Q. The only way you had to measure grades was with your eye, wasn't it?

A. Well, I didn't really measure that; the only way I would tell was by where the track came up.

Q. Now, I understand you to say that you were positive that there were places beginning at a point two hundred feet north of the Shannon switch extending down to the wagon road crossing over the roadbed in front of the Shannon store, was one-half of one per cent, or more before you raised the roadbed? A. Yes, sir.

Q. Now, how do you know this?

A. From the distance of the height I pulled the track with a jack.

Q. Will a loaded car, or one or more loaded cars, move of their own volition on a grade of one-half of one per cent, if the brakes are not set, nor the wheels chocked?

A. It's owing to how the engineer handles them, and when they cut the engine loose, lots of times it's liable to move the car. A car can stand on a joint if the center is high, just so the wheels are on a turn;

(Deposition of W. H. Parker.)

it's liable to move on a grade.

[551] Q. Were there any such joints on this piece of track on the 15 day of April, 1911?

A. I don't remember whether there was or not.

Q. Well, now, if cars were standing perfectly still, loaded, will they move of their own volition on a grade of half of one per cent?

A. It's owing to circumstances, a train could be a passing and start them, or you could be standing on top of the car and start it by shaking it.

Q. Now, will it start without some one of these conditions?

A. I believe it would; it's on a hill, and anything that rolls will roll down a hill.

Q. Did you ever see a car roll on a half of one per cent grade?

A. No, I never saw one roll on one.

Q. Then you, as an expert, give your opinion.

A. Don't class me as an expert.

Q. Do you think that a car would stand of its own motion on a grade of one-fourth of one per cent?

A. Chances are it would.

Q. What about one-eighth of one per cent?

A. You are getting down too fine for me.

Q. Did you ever see any cars get away on a grade?

A. Yes, sir, in this yard.

Q. What was the grade?

A. I don't know what the grade was.

[552] Q. Where was that?

A. Don't remember, but believe in the Coronado yards.

(Deposition of W. H. Parker.)

Q. Did you ever see a car get away in the yards of the defendant here in Clifton? A. No, sir.

Q. The grade in the yards up north of the Shannon switch are as steep as they are below, are they not?

A. Yes, sir.

Q. And the grade here is as steep as the grade you have been speaking about?

A. I couldn't say, unless you put a level on it.

Q. And you don't know what the grade was at the time of the accident? A. No, sir, I don't.

Q. Don't know whether it was one-eighth of one per cent or two per cent?

A. It was more than an eighth, a half per cent, anyway.

Q. What would you say to a civil engineer if he would tell you that he had put an instrument on the grade from the Shannon switch to the crossing, and there wasn't a place between those points where the grade was one-fourth of one per cent?

A. I wouldn't believe him.

Q. In other words, you would take your own opinion in reference to a grade to that of a competent engineer?

A. Yes, sir; I have seen them put down three stakes, and they wouldn't line.

[553] Q. Who had obtained the grade by the use of instruments?

A. No, sir; I am not that far up, but on that particular track I wouldn't believe him; but would after I had raised the track.

(Deposition of W. H. Parker.)

Redirect Examination.

(By M. KEARNEY.)

From the Shannon switch to the wagon crossing in front of the Shannon store, being a stretch of defendant's railroad, about five or six hundred feet, is that road straight?

A. From the Shannon switch to the Shannon crossing, is straight as near as I can remember.

Q. When did you raise that part of the defendant's road?

A. I don't remember; it was at the time we were putting in that block signal. I have forgotten exactly what day it was—eight or ten months from present time.

Recross-examination.

(By Mr. McFARLAND.)

Q. Will a loaded car or three or four loaded cars start more readily from gravity on a straight track than they will on a curved track?

A. Certainly they will.

Q. Do you say that from experience or just as an opinion? A. I say that from opinion.

[Deposition of G. L. Coffee.]

[554] The deposition of G. L. COFFEE, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

Q. What is your name? A. G. L. Coffee.

Q. Age? A. 31.

Q. Place of residence? A. Clifton, Arizona.

(Deposition of G. L. Coffee.)

Q. Occupation? A. City Marshal.

Q. Do you know the plaintiff, Thomas P. Clark?

A. Yes.

Q. Are you acquainted with that piece of railroad bed of the defendant between the Shannon switch and the railroad bridge in the town of Clifton, Arizona?

A. In some ways.

Q. You recognize the location of that piece of track? A. Yes.

Q. Did you see the plaintiff on March 15, 1911?

A. Yes.

Q. Did you witness the accident of plaintiff on defendant's road March 15, 1911? A. Yes.

[555] Q. Just tell what you saw and know about that, making a detailed statement.

A. Well, I was coming uptown that morning, I was coming up the road, and they were fixing to make the Shannon hill with some cars, and there were some cars sitting on the spur, and they had pulled down and had come back, making the Shannon hill run, when the accident then occurred. Clark was engineer, Jack Chambers was on the engine firing, I think St. Thomas was there, and Kline; and when the accident occurred Kelly came out, I think, from his house. Gatti came up there and I ran around the engine, and Clark was off his engine on the ground. I asked him if he was hurt, and about that time Kelly came up. Kelly asked him if he was hurt; he said he was. Gatti and another party, whom I don't remember positively, but I think Kelly helped Clark

(Deposition of G. L. Coffee.)

up, and assisted him in getting to the hospital or his home.

Q. How long before the cars collided with the engine of which Clark was running; did you see those cars?

A. I should judge about two minutes.

Q. What place did you see them?

A. On the spur.

Q. Did you observe four cars that collided with the engine before the collision took place?

A. In a way.

Q. What was that way?

A. Well, I took no particular notice of the cars.

[556] Q. Did they roll any distance after you saw them before they collided with the engine?

A. I can't say.

Q. Did you witness the collision? A. Yes.

Q. What part of the engine did these cars strike?

A. I think they struck the cab.

Q. Was the position of Mr. Clark such that he could see those four freight-cars before they collided with his engine? A. I should say he could not.

Q. Why do you say he could not see them?

A. The condition of the track would prevent him from seeing them.

Q. At that time, did that part of the track slope toward the north? A. I don't know.

Q. John T. Kelly wasn't there until after the collision?

A. He was away, to the best of my knowledge.

Q. Do you know where he was?

(Deposition of G. L. Coffee.)

A. I think he was at his house.

Q. About the time of the collision, Kelly came from the direction of his home?

A. The best I can remember he did.

Q. Was J. M. Kline there all the while?

A. He was there when I saw the accident.

[557] Q. At the time of the collision, where was J. M. Kline?

A. I can't say, but he was present on the ground, when I ran around the engine.

Q. Did you observe Kline on any box-cars just before the accident?

A. There was someone on the cars that was on the engine, but I don't remember which of the two it was.

Q. Those were the cars which were then being pushed up on the Shannon spur? A. Yes.

Cross-question.

(By Mr. McFARLAND.)

Q. At what point and at what distance were you at the time the collision occurred on the engine of Mr. Clark?

A. I was directly opposite the engine in the street, possibly forty feet distant from the engine.

Q. From what direction had you come to this point? A. South.

Q. That would be from the direction of the bridge, would it? A. Yes.

Q. Did you see the cars on the main line?

A. I saw the cars.

Q. Where were they when you first saw them?

A. Below the switch.

(Deposition of G. L. Coffee.)

[558] Q. What direction would that be from the switch? A. South.

Q. How far were they from the switch?

A. That I can't say.

Q. When did you first see Mr. Clark's engine?

A. When they started to make the run for the Shannon hill.

Q. That would be going approximately south.

A. Yes.

Q. What was the speed of his engine, fast or slow?

A. I should judge possibly making fifteen miles an hour.

Q. Did you hear any signal?

A. Can't recall if I did.

Q. Were there any signs given by anyone?

A. Not that I know of.

Q. From your position you could see Clark's engine, and also the cars on the main line before the accident? A. Yes, sir.

Q. And you say that you don't think it possible for Clark to have seen the cars on the main line before the accident? A. I don't think he could.

Q. Did you see Mr. Clark after the accident?

A. Yes.

Q. Did he say he was injured? A. Yes, sir.

[559] Q. What did he say?

A. He said his back was hurt.

Q. Did you notice his face? A. Yes, sir.

Q. And his head? A. Yes, sir.

Q. Did you see any evidence of bruises or violence on his head or face? A. I did not.

(Deposition of G. L. Coffee.)

Q. Did he make any complaint about any injury to his face or head? A. Not that I heard.

Q. Did you notice his eyes?

A. Not particularly.

Q. Did you notice any evidence of bruises or violence to his eyes or either of them? A. No, sir.

Q. What is your position? A. City marshal.

Q. And was it at that time? A. Yes, sir.

Q. Do you know about how long after the accident that Mr. Clark got out of his home?

A. No, I do not.

Q. Well, approximately, how long have you seen him out since the accident?

A. I haven't the slightest idea.

[560] Q. Six months? A. I should say so; yes.

Q. What was he doing when you saw him out?

A. Knocking around town.

Q. Seem to get around pretty well? A. Yes.

Q. Did you notice any difference of his getting around and about before than since the accident?

A. Not particularly so.

Q. Seems to get around like anyone else, doesn't he? A. Yes.

Q. If you hadn't known that he was injured would the way he walks and moves around indicate to you that he had ever been injured?

A. I don't think so.

Q. Then you see no difference now in the way he walks around and gets about town, to the way he walked and moved around before the accident?

(Deposition of G. L. Coffee.)

A. No, sir.

Q. Have you seen him almost daily since he got out of his house after the accident? A. No, sir.

Q. Well, approximately how often have you seen him in the last six months?

A. Possibly a dozen times.

[561] Redirect Examination.

(By L. KEARNEY.)

Q. At the time Mr. Clark was injured, did you make a special examination of his left eye, whether it or that part of his head next to that eye had received a bruise? A. I made no examination at all.

Q. Then, for all you know, he may have received a serious bruise about his left eye?

A. It's possible, for the reason that he was carried away immediately; everyone was very much excited at the time.

Recross-examination.

(By Mr. McFARLAND.)

Q. You say you saw his face; if he had had a serious bruise at or near his left eye, would you likely have seen it?

A. It's an equal chance that I would or I wouldn't.

Q. If he had had an arm severed from his body, would you have likely have seen that or noticed that?

A. I ran around the front of the engine, and he was with his face towards the car, and I came around on the left side, his left side. By the time I got there or immediately afterwards, Kelly and Gatti ran up and picked him right up and carried him right off.

[Deposition of E. T. Morton.]

[562] The deposition of E. T. MORTON, omitting caption and certificate is as follows:

Direct Examination.

(By L. KEARNEY.)

Q. What is your name? A. E. T. Morton.

Q. Age? A. 26.

Q. Place of residence? A. Clifton, Arizona.

Q. Occupation?

A. Civil and mining engineer.

Q. What experience have you had in civil and mining engineering?

A. I have had four years' practical experience.

Q. Are you a deputy of the United States, and mineral surveyor? A. I am.

Q. Are you acquainted with the section of the railroad track of the defendant lying between the Shannon switch and the defendants' railroad bridge which crosses the San Francisco River, in the town of Clifton, Greenlee County, Arizona; and also that part of the defendant's road adjoining said Shannon switch and extending north thereon for the distance of two hundred feet?

A. I am acquainted with the road from the point of [563] switch to the point of curve in front of the Shannon store.

Q. Is the switch you refer to the one I mentioned—the switch Shannon? A. It is.

Q. Have you recently made a survey of that part of defendant's road for the purpose of returning the grade thereof? A. I have.

Q. What are the measurements—have you a pro-

(Deposition of E. T. Morton.)

file map of that part of the road? A. I have.

Q. Is it a correct map of that part of the road in its present condition? A. Yes.

Q. Was this map made under your supervision?

A. It was.

Q. Do you here ascertain that it is correct?

A. I do.

Q. Map is marked Plaintiff Exhibit No. 2 and filed for evidence.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say this is a correct map of that part of defendant's roadbed and is made from actual measurements on the ground? A. It is.

[564] Q. Did you make it yourself?

A. I took all the measurements myself; made the calculations and checked the drawing after it was made.

Q. But you did not make the drawing on the map as offered in evidence?

A. No, but it was made under my supervision.

Q. By whom? A. H. C. Macovain.

Objected to by the counsel for the defendant, on the ground that the best evidence of the map offered is by the party who actually made the map.

Redirect Examination.

Q. You have actually checked the map in reference to your measurements on the ground? A. I have.

Q. Is it a correct representation of your measurement? A. Yes.

Q. Locate the switch on this drawing.

(Deposition of E. T. Morton.)

A. Point of switch is designated on the upper left-hand corner of Plaintiff's Exhibit No. 2.

Q. Point of Shannon switch, then, from there, on what part of your map have you marked wagon road crossing?

A. No point is marked wagon road crossing, but the wagon road crossing is a few feet in front of the point of curve in front of the Shannon store.

[565] Q. From the point that you have designated as crossing to the Shannon switch is a distance of how many feet?

A. There isn't any point of distance made as crossing, but the point of curve as designated is five hundred and twenty-five feet from the Shannon switch.

Q. This track of road shown by your map, what is the grade of it now between Shannon switch and the curve?

A. Beginning at the point of the switch at the Shannon Hill and proceeding towards the point of curve in front of the Shannon store, the first hundred and fifty feet is an average grade of thirteen hundredths per cent down, the next seventy-five feet had an average grade of zero, the next three hundred feet has an average upgrade of sixteen hundredths per cent.

Q. If the point of switch should be one foot lower than it is at the present time extending back gradually to the point of curve covering that distance of five hundred and twenty-five feet, then that would be the grade of that part of the road?

A. The grade would be one-fourth of one per cent

(Deposition of E. T. Morton.)

down for the point of curve to the point of switch.

Q. What direction nearly does that road run in reference to the cardinal points of the compass?

A. Nearly north and south.

Q. Does the writing on exhibit No. 2, marked point of switch to Shannon hill, designate a north part of that road with reference to the point of curve in front of [566] Shannon store? A. It does.

Q. Between the points just designated, is that road straight or curved? A. It is straight.

Recross-examination.

(By Mr. McFARLAND.)

Q. How did you ascertain the grade of the roadbed between the several points set forth on the map?

A. By measuring the total distances, beginning at the point of switch and taking points every twenty-five feet, on both rails to the point of curve and finding the difference of elevation of these points, then taking the average of the elevation on the rails and dividing the difference of elevation of the points designated by the horizontal distance between said points.

Q. What did you find to be the average grade from the point of curve as shown on the map and the Shannon switch?

A. I didn't calculate the average grade between those two points.

Q. Then your map only shows the grade of the roadbed between the different points designated on the map between the point of curve and the Shannon switch?

(Deposition of E. T. Morton.)

A. It shows the downgrade and the level portion of the track and the part of the grade that is ascending; [567] it shows the track exactly as it is.

Q. Does your map show the average grade descending and the average grade ascending between the point marked on your map as point of curve in front of the Shannon store and the point designated on the map, point of switch at the Shannon hill?

A. You have got to make that question fuller for it to mean anything.

Q. When did you make this map?

A. The eighth and ninth of April, 1912.

Q. Do you know what the grade of that roadbed is between the points designated on the map and was on April 15, 1911? A. I do not.

Q. Do you know what the grade was at any time between March 15, 1911, and the date that you made your survey. A. I do not.

Q. For whom, if anyone, did you make this survey and map? A. I was employed by Mr. Kearney.

Q. Do you mean L. Kearney, counsel at law, of Clifton? A. I do.

Q. Is it the same Kearney who is the attorney for the plaintiff in this case?

A. I am not acquainted with the plaintiff.

[568] Q. Is it the same Kearney who is attorney for the plaintiff in the cause now pending?

A. It is.

Redirect Examination.

(By L. KEARNEY.)

Q. Morton, you have designated on your map, Plaintiff Exhibit No. 2, the letters to Shannon hill,

(Deposition of E. T. Morton.)

which designates apparently a road leading off from another road. I wish you would tell me what this is.

A. That is the beginning of a switch leading from the main line of the Arizona & New Mexico R. R. to Shannon hill.

Q. Does that switch run to the Shannon Copper Co. smelter? A. Yes.

Q. Approximately about what distance?

A. A little over half a mile.

Q. Did you ascertain the grade from the switch designated on the map to the Shannon hill, or any distance from the point of switch?

Objected to by counsel for the defendant, because map doesn't show any survey of that line of road; it's irrelevant and immaterial, what the grade is.

A. I did.

Q. What is the elevation point of the Shannon switch leading on up over the Shannon spur to the Shannon smelter covering the distance that you took the measurements?

[569] A. I don't remember the exact elevations, but remember the percentage of grade.

Q. What is the grade per cent?

A. Commencing at the point of switch and proceeding towards the Shannon hill the first one hundred and ten feet has an upgrade of two and four-tenths per cent; the next one hundred feet had an upgrade of three and thirty-six hundredths per cent; the next hundred feet has an upgrade of three and sixty-three hundredths per cent; that is as far as I determined the grade.

(Deposition of E. T. Morton.)

Q. Those measurements you just mentioned being upgrade, are made on the Shannon switch which leads off to the Shannon Smelter?

A. They were.

Recross-examination.

(By Mr. McFARLAND.)

Q. Are those measurements and elevations shown on your map? A. They are not.

Q. Why didn't you make your map show these elevations?

A. I determined them after the map was made.

Q. Then your first instructions from Mr. Kearney were to obtain the distances and elevations on the main line of the defendant company?

A. I understood them to be such, but on conversing [570] with Mr. Kearney he stated that he had asked for the grade on the first part of the switch.

Q. Do you know the average grade for the first four hundred feet beginning at the Shannon switch?

A. I haven't calculated the average grade for the first four hundred feet, but determined the grade for the first hundred and ten feet; then the next three hundred at intervals of one hundred feet.

[Deposition of Thomas J. St. Thomas.]

[571] The deposition of THOMAS J. ST. THOMAS, omitting caption and certificate, is as follows:

Direct Examination.

(By H. A. HARDINGE.)

Mr. HARDINGE.—I suppose it may be stipu-

(Deposition of Thomas J. St. Thomas.)
lated that the testimony may be taken down in shorthand and then reread to the witness or read by him afterwards, the same as if taken in long-hand?

Mr. McFARLAND.—That is satisfactory.

Q. State your name, age, occupation and place of residence?

A. Thomas J. St. Thomas; age, 26; switchman; residence, Pajaro, California.

Q. Are you acquainted with the plaintiff, Thomas P. Clark? A. Yes.

Q. How long have you known him and where?

A. I have known him at Clifton, Arizona, from May, 1908, until April, 1911.

Q. Where were you on March 15, 1911?

A. Clifton, Arizona.

Q. What were you doing?

A. I was employed as a switchman in the Clifton yards.

Q. For the Arizona and New Mexico Railway Company, a corporation, the defendant in this action? A. Yes.

Q. Were you working as a switchman at that time? [572] A. Yes.

Q. Who composed the crew with whom you worked?

A. J. T. Kelly, yardmaster, J. M. Kline, foreman, Jesse Murphy, brakeman, Jack Chambers, fireman, and Thomas P. Clark, engineer.

Q. This Thomas P. Clark is the same man that was injured later? A. Yes, the same man.

Q. Are you acquainted with that part of the de-

(Deposition of Thomas J. St. Thomas.)

fendant's railroad track about eight hundred feet southerly from the Shannon switch to the defendant's railroad bridge which crosses the San Francisco River in the town of Clifton, Arizona?

A. Yes.

Q. Is that the part of the road where the accident took place at that time? A. Yes.

Q. How long have you known that particular part of the track?

A. From May, 1908, until May, 1911.

Q. How familiar were you with the track, this particular part of the track?

A. I have been over it not less than twice a day at the time I was there.

Q. And you were a member of the crew that was moving cars across over this particular track on the said 15th of March, 1911? A. Yes.

Q. Was anyone injured on that day?

[573] A. Thomas P. Clark was injured.

Q. How was he injured?

A. Cutting off four cars and leaving them on the main track, and pulled the other four up with the engine over the switch and starting back up the hill to Shannon switch, and the cars rolled down and collided with the engine.

Q. These four cars that were left at the Shannon switch, how were they secured? A. No way at all.

Q. The brakes were not set?

A. No brakes were set, and the cars were not blocked.

Q. Should these cars have been blocked?

(Deposition of Thomas J. St. Thomas.)

Mr. McFARLAND.—I object to that as calling for an opinion of the witness, and the witness is not qualified as an expert. A. Yes.

Q. Why do you say these cars should have been blocked?

A. Because the cars rolled down there twice before.

Q. Where these cars were left, was it down or up grade?

A. That certain part of the track was inclined to be downgrade.

Q. If the brakes on these cars had been set or the cars been blocked, would they have rolled down the hill or ran down the hill? A. No.

Mr. McFARLAND.—I object to that upon the same grounds as the previous question.

[574] A. No.

Q. Now, how do you know that these brakes were not set nor the same blocked or chocked?

A. Because I saw J. M. Kline cut the four cars off and did not get up on top of the cars and did not set the brakes and did not block the same.

Q. Whose duty was it to set the brakes on these four cars which collided with the engine?

A. J. M. Kine.

Q. Did you see these four cars collide with the engine? A. Yes.

Q. What length of time expired, to the best of your judgment, from the time you first saw these cars approaching the engine until the collision took place?

A. A very short time; maybe ten seconds.

(Deposition of Thomas J. St. Thomas.)

Q. How far away were the cars from the engine when you first saw them? A. 15 or 20 feet.

Q. Just before the collision took place was there a stop signal given to stop the engine? A. Yes.

Q. Who gave the signal? A. J. M. Kline.

Q. Could the engineer have seen these approaching cars? A. No.

Q. Why?

A. It was on a curve and the cars obstructed his view.

Q. What cars obstructed his view?

[575] A. The ones they were shoving up the hill next to the engine.

Q. Should the stop signal have been given by Mr. Kline? A. No.

Q. Why?

A. If the stop signal had not been given the engine and cars would have cleared the main line; the engine was going about eight miles an hour, and the cars were going very slow.

Q. About what rate were the cars going?

A. Not half as fast as the engine.

Q. Not half as fast as the engine? A. No, sir.

Q. How far ought the engine to have gone to have cleared, approximately?

A. Oh, about 16 or 20 feet.

Q. And these cars were from 15 to 20 feet, or probably 25 feet from the engine when you first observed them? A. Yes.

Q. And when was the stop signal given in regard to the time you first observed the approaching cars?

(Deposition of Thomas J. St. Thomas.)

A. The stop signal was given a few seconds before.

Q. How far were the cars from the engine when the stop signal was given?

A. About a car-length and a half.

Q. How many feet would that be?

A. About 60 feet.

Q. About 60 feet. Then, as a railroad man and familiar with railroading, would you say that if the stop signal had not [576] been given, and the car was about a car-length and a half from the engine, and the cars were moving only one-half as fast as the engine, would not in all probability the engine have cleared if the stop signal had not been given?

A. Yes.

Mr. McFARLAND.—I object to that as calling for the opinion of the witness, and the witness is not qualified as an expert. A. Yes.

Q. You have been railroading a number of years, have you? A. Six or seven years.

Q. From this railroad bridge to the Shannon switch is it or is it not downgrade?

A. Inclined to be downgrade in certain places.

Q. State whether or not if cars were left on that point of the track between the said railroad bridge and the Shannon switch without the brakes having been set or the same blocked, would or would not they remained thereon?

A. At times they would remain there and other times they would roll down.

Q. Have you seen them roll down there before this? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Twice before? A. Yes.

Q. Had Mr. Kline and the other members of the crew also seen them roll down?

A. They were present at one time they rolled down that I know of.

[577] Q. At the time of the collision was it the duty of anyone to keep a lookout for the cars that might run down the track and cause such a collision?

A. The whole crew was supposed to look out.

Q. Did you have a full crew at the time of the accident that day?

A. Not at the time of the accident.

Q. Not at the time of the accident?

A. One switchman was left up on top of the hill.

Q. Who was the party that was left up on top of the hill? A. Jesse Murphy.

Q. Now, what would you say was the proximate cause of Mr. Clark's injuries?

Mr. McFARLAND.—I object to that as calling for the opinion of the witness.

A. Because the cars came back down on the main line and collided with the engine because the brakes were not set, and that stop signal given to the engineer.

Q. Did the railroad company enforce any rules for the management and conduct of its cars and the management of the same?

A. They had a book of rules but they never were enforced.

Q. Did you ever give signals to Mr. Clark, the engineer? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Did he observe those signals readily?

A. Yes.

[578] Q. Do you know whether his eyesight was good or bad? A. As far as I know it was good.

Q. Did you ever hear any complaint about him not observing the signals? A. No.

Q. Now, to what extent was Mr. Clark injured, or how was he injured?

A. When I saw him he was on the ground, complaining of his back; could not walk, and had a little scratch over his left eye, bleeding a little bit and his hip bothered him some.

Q. What was the condition of the engine where he was, his place in the engine?

A. The cab was strained out of place; the pipes broke along the side of the engine.

Mr. HARDINGE.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. I understand that you say that you were in the service of the defendant from 1908 until 1911?

A. Yes.

Q. During that time in what capacity did you serve? A. Braking and switching.

Q. Of course you are familiar with the yards at Clifton?

A. I worked steady in the yard for the last two years.

Q. Were in the yards. Which two years was that? A. The last two years.

Q. That would be 1910 and 1911? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. What time did you leave the service of the defendant? A. It was in April.

[579] Q. How long after the accident?

A. Why, about a month, I think.

Q. Then did you come directly to California?

A. No, I stayed in Clifton two months, I think.

Q. Still in the service of the company?

A. No, I was in the service of the—

Q. How long after the accident did you remain in the service of the company? A. About a month.

Q. Now, you say that cars left standing on the main line between the railroad bridge and Shannon switch would move if the brakes were not set or the cars chocked?

A. They would at times and at times they would not.

Q. During the two years that you worked as brakeman in the yards how often were you engaged in switching cars from the main line up to the Shannon switch?

A. It would be once or twice every day.

Q. Once or twice every day? A. Yes.

Q. Now, during that two years the cars that were left there without the brakes being set or being chocked remained on the track?

A. Yes, except twice that I saw them roll down.

Q. Twice in the two years? A. Yes.

Q. And during the other portion of that time they did remain stationary or move without the brakes being set or being blocked?

[580] A. As far as I know.

(Deposition of Thomas J. St. Thomas.)

Q. As far as you know. So that was the usual method employed by the employees in switching the cars to the switch?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial.

Q. Was Mr. Clark familiar with the method of switching cars from the main line up to the Shannon switch? A. Yes.

Q. He knew it was the custom of the employees to permit cars to remain without the brakes being set or blocked, or without the wheels being chocked on the main line that were to be taken up to the Shannon switch?

Mr. HARDINGE.—I make the same objection.

A. As far as he knew, I guess he did not know whether the brakes were set or not, or whether they were chocked.

Q. Do you know the rule of the company requiring the engineer to see that the brakes were set on all trains when stopped?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and the rule-book of the company is the best evidence.

A. No, I do not.

Q. You don't know that? A. No.

Q. Do you know that the rules of the company require the engineer to see that the brakes are set before he disconnects his engine either with or without cars?

A. No, I don't know of it in the yard service.

[581] Mr. HARDINGE.—I object to that on the same grounds.

(Deposition of Thomas J. St. Thomas.)

Q. Do you know of it in any other service?

A. No.

Q. Did you have a copy of the rules? A. No.

Q. Did Mr. Clark have a copy of the rules, so far as you know?

A. They never furnished a copy of the rules. I never seen a book of rules as long as I have been there.

Q. You know Mr. Clark did not have a book of rules?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial.

A. I don't know whether—he may have had one, but I don't know.

Q. You don't know anything about that?

A. No, sir.

Q. Do you know what the grade on the main line from Clifton is between the railroad bridge and the Shannon switch? A. About six miles an hour.

Q. The grade, I say. A. The grade?

Q. Yes.

A. Why, it is a little bit—supposed to be level, a little bit downgrade towards the switch.

Q. You mean to say it is down grade from the bridge to the Shannon switch?

A. In a certain place by the crossing it is inclined to be a little bit downgrade.

[582] Q. About how much?

A. Not a great deal; just the least bit.

Q. Are you prepared to say just what grade a car will stand without the brakes being set? A. No.

567

(Deposition of Thomas J. St. Thomas.)

Q. Then why do you say that a car would run on that grade if the brakes are not set?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and argumentative.

A. Because I have seen them run there twice.

Q. Then you have seen them stop there when they did not run, haven't you? A. Yes.

Q. And you have seen them during the years 1910 and 1911? A. Yes.

Q. And only two instances where they did run?

A. Yes.

Q. And all other instances they remained where they were set without the brakes being set

A. As far as I know.

Q. Where were those cars that were moved up to that joint the day of the accident?

A. They were between the bridge across the Frisco river and the Shannon switch.

Q. Were they there—did you find them there when you went down that day?

A. No, they were left there from the yards, shoved down from the yards.

[583] Q. Up toward the tank?

A. Up towards the tank. Came in on a freight train just before that.

Q. That is on the morning of the 15th?

A. They came in in the forenoon—came in on the same train, or a train just came up and we switched them out and were taking them up the hill.

Q. You are quite positive about that?

A. I am quite positive about it; that is my recol-

(Deposition of Thomas J. St. Thomas.)

lection about the way we got the cars.

Q. And when cars that were taken down to the point between the Shannon switch and the railroad bridge were taken from the main line would the direction be towards the top? A. Yes.

Q. How many of them were there taken down that morning? A. 12.

Q. Had any cars been switched from the main line up to the Shannon switch previous to the time the accident occurred? A. No.

Q. These were the first cars?

A. Four cars were switched up before these four were taken down: 12 was taken down and that left 8 down below.

Q. Were the brakes set on those four cars that you left, the first four? A. No.

Q. Did they move? A. No.

Q. Then it was the second four cars that were being taken [584] up that collided with the engine.

A. No, it was the last four that was run down that collided with the engine.

Q. The last four? A. Yes.

Q. Then 8 had been previously switched up?

A. Four had been switched up and four more were going up, and there were four more left down there.

Q. The second four?

A. The second four, just taking them up when the other four collided with them.

Q. Do you know a man in Clifton by the name of John C. Gatti? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Was he there the day of the accident?

A. He helped take Mr. Clark over to the house.

Q. If you say that this collision would not have occurred, the four remaining cars on the track would not have rolled unless the brakes had been set, why was it that the cars that were there before these, including these four, did not run when the brakes were not set?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and also a conclusion of the witness.

A. The cars that ran were set back farther; they were back, cleared further than these four were; sometimes cars were left farther from the crossing and sometimes right up to the crossing.

[585] Q. You say you never knew of any defect in Mr. Clark's eyesight?

A. Not that I ever heard of.

Q. And to your personal knowledge he always obeyed signals promptly?

A. He did for me, as far as I know.

Q. You can only speak so far as your personal knowledge is concerned? A. Yes.

Q. So far as you know personally? A. Yes.

Q. You don't know whether he obeyed signals given him by others or not?

A. As far as I knew he did.

Q. It was his uniform course to obey signals promptly?

A. That was what he was supposed to do.

Q. How long have you known Mr. Clark?

(Deposition of Thomas J. St. Thomas.)

A. Since May, 1908, until May 1911.

Q. Now, you are positive that you saw Mr. J. M. Kline cut off the four cars? A. Yes, sir.

Q. They were disconnected from the train that caused the accident? A. Yes.

Q. And you are positive that he did not set any brakes on those cars? A. Yes.

[586] Q. You know that? A. Yes.

Q. And are positive of it? A. Yes.

Q. What were you doing at the time he cut those cars?

A. I was up on the head car passing signals.

Q. On the four cars that were in the accident?

A. The four cars that were tied to the engine.

Q. Then they had been cut off from the train?

A. No, it was tied to the engine.

Q. Tied to the engine?

A. The four cars we were holding on to. I was on the car next to the engine, the four cars that were cut off.

Q. Where was Kline at the time?

A. He was four cars from the engine cutting off the four cars.

Q. You are positive that he was there?

A. I am.

Q. You were watching him at the time?

A. Yes.

Q. Would you have seen if he had set or had not set the brakes? A. Yes.

Q. Why did you not direct him to set the brakes if they were not set?

(Deposition of Thomas J. St. Thomas.)

A. It was not my place to direct; he was the foreman; he was there; he was supposed to direct us.

[587] Q. If you knew the cars would not stay there without being blocked or having the brakes set, why did you not go back and set the brakes?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and as having been already answered.

A. Because it was not my place to do so. He was foreman; he was supposed to do so, to instruct us what to do, and he knew because—

Q. Was Kline foreman? A. Yes.

Q. Did you ever set any brakes at all without his direction when you were switching? A. No, sir.

Q. You never did anything except what he told you to do?

A. I did not, no, sir, only if he did not happen to be there.

Q. From whom did you get directions to discharge your duty if he was not there?

A. When he was not there?

Q. Yes.

A. I would have to do my duty and do the best I could.

Q. So that there were times when you set brakes and did other things without his direction?

A. Yes.

Q. You say he gave you no directions at this time?

A. No.

[588] Q. Quite positive he did not set the brakes?

A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. And you knew that the cars would roll if the brakes were not set?

A. I knew they rolled at certain times; sometimes they would roll and sometimes they would not.

Q. Was Mr. Clark where he could see Kline?

A. No, it was on a curve.

Q. At the time that the cars were disconnected from the train?

A. At least the engine was on a little curve.

Q. So that Mr. Clark in the engine could not see Mr. Kline from where he was at the time the four cars were disconnected from the train?

A. I can't say he saw him, being on a curve and hid from him.

Q. I am speaking of the time when you were speaking about disconnecting the cars.

A. That is what I am speaking about.

Q. You are positive he could not see him?

A. I don't think he could see him because I took my signal from him, to go ahead.

Q. Did you give that direction from Mr. Kline to him, give him that signal, to go ahead? A. Yes.

Q. Now, where was the engine approximately, between the railroad [589] bridge and the Shannon switch, when that signal was given to go ahead?

A. Why, about a car-length north of the Shannon switch, a little better than a car-length.

Q. You say that Mr. Clark at that position on his engine on the track could not see Kline at that time?

A. He probably could have seen him if he looked for him, but he was not looking for him. I was on

(Deposition of Thomas J. St. Thomas.)
top; he may have seen him if he looked for him. I don't believe he looked for him.

Q. He did not look to Mr. Kline for signals, but he looked to you?

A. I gave the stop signal and go ahead signal; he took it from me.

Q. Did Mr. Kline direct you when to give this stop signal and go ahead signal?

A. Whenever he gave it I passed it to the engineer.

Q. You passed it to him from Mr. Kline?

A. Yes.

Q. Positive about that? A. Yes.

Q. As positive about that as anything else you have testified to?

A. He gave me the go ahead signal and I passed it to Mr. Clark.

Q. In moving these cars from the main line, on the main line, in order to get up to the Shannon switch, how far [590] up north would you go above the Shannon switch before you began to back them up by the switch?

A. Sometimes two or three car-lengths over the switch.

Q. Two or three car-lengths? A. Yes.

Q. How far did that carry them around the curve?

A. Why, four cars, that would carry them around the point of rocks.

Q. Now, I understand you to say in your direct examination that if Mr. Clark was on his engine and at the point of rock there, that he could not see the

(Deposition of Thomas J. St. Thomas.)

four cars coming down north from the railroad bridge?

A. At the point of rock he could see those cars standing on the track and backing away, only about a second when they would be in sight, these cars on the switch would be out of sight.

Q. What would obstruct the view?

A. The cars backing up the hill.

Q. On which side of the engine in reference to cars that were rolling would he be in backing up to the Shannon switch?

A. He was on the right-hand side of the engine when he hit the switch.

Q. The same side the cars were rolling, would he not?

A. Well, when he got around the curve he would be on the same side the cars were on.

Q. But before that he would be on the other side?

[591] A. Before that his engine would be on the curve and he could see across; he could see the cars across the engine on the curve and see the cars backing up; when he started uphill he would be on the same side the cars were.

Q. He would change sides then when he—from the time he started?

A. He would not change sides at all.

Q. I understand you to say that from his position on the engine when he was backing these cars up to the Shannon switch, that at the point of rocks he could not see the cars rolling on the main line?

A. He could see the cars on the main line at the

(Deposition of Thomas J. St. Thomas.)
point of rock; he could see those cars from the tank looking across the tank; looking across the engine, looking back that way, but nobody could tell whether they were moving from that distance or not.

Q. But he could see them?

A. He could see them generally from that distance.

Q. What distance would that be north of the Shannon switch?

A. It would be about six or seven car-lengths.

Q. Then he could see the cars on the main line six car-lengths north of the Shannon switch?

A. Before he started to back up.

Q. Before he started to back up, would there be anything to obstruct his view after he began to back up until he got his engine onto the switch?

[592] A. Yes, the cars that were backing up would obstruct his view.

Q. He could not see them? A. No, sir.

Q. He could only see them when he started backing up?

A. He could see the cars when they started.

Q. Mr. Kline was on the fourth car from the engine, you say? A. Yes.

Q. How many cars had cleared the main line and were onto the switch at the time of the collision?

A. Four.

Q. Four. How much, if any, of the engine had cleared the main line and onto the switch before the collision? A. Why, the tank had cleared.

Q. Now, I understand you to say that this signal had not been given to Mr. Kline that the engine would

(Deposition of Thomas J. St. Thomas.)

have cleared and there would have been no accident?

A. Yes.

Q. Where was Mr. Kline when he gave this signal?

A. The last car.

Q. Then he would be four car-lengths from the engineer? A. Yes.

Q. No one on those cars except you and Mr. Kline?

A. That is all.

Q. Two of you? A. Yes.

[593] Q. You are quite positive he gave that signal? A. Yes.

Q. You saw him give it?

A. I saw him give it.

Q. And knew when he gave the signal it would cause a collision?

A. I did not know at the time. I knew afterwards. I did not think at the time. I was excited.

Q. Didn't you know that the engine would not clear itself on the main line if he obeyed that signal?

A. Well, he started to stop and then it was no use; we were up against it. I knew it was going to hit after it got started to stop.

Q. You say that if that signal had not been given him the engine would have cleared the main line and got onto the Shannon switch safely?

A. At the rate the cars were going about eight miles an hour, in my judgment he would have cleared.

Q. And you knew that at the time the signal was given?

A. I did not think of it at the time the signal was given. I knew of it afterwards.

(Deposition of Thomas J. St. Thomas.)

Q. And yet you did not counteract that signal or make a motion to keep going?

A. No; it was too late.

Q. Knowing that that would cause a collision if that signal was obeyed?

A. Well, I did not take time to think about it then.

[594] How long was it after the signal was given that the accident occurred?

A. A few seconds; about ten or fifteen seconds, I think.

Q. You were on the car next to Mr. Clark?

A. Yes.

Q. Which end of the car?

A. On the end next to the engine.

Q. And was your attention directed before that signal or at the time to Mr. Kline or Mr. Clark?

A. I saw Mr. Kline at the time.

Q. What position were you on that car?

A. Sitting on the end of the car.

Q. Which way was your face—north or south?

A. South, not quite south, kind of sideways.

Q. Were you sitting on the end or the side of the car?

A. The side of the car, right where the step is to climb up on the top of the car, the engineer's side.

Q. The engineer's side? A. Yes.

Q. You at that time were watching Mr. Kline?

A. I had to turn around to see him. I turned around to see him give the signal at the same time I see the cars.

Q. You never saw the cars until you got the sig-

(Deposition of Thomas J. St. Thomas.)

nal? A. No, sir.

Q. You were sitting on the side of the main line?

A. Yes.

Q. And you could not have been over ten or fifteen feet [595] from that car as it was rolling down?

A. I was 20 or 25 feet.

Q. From the car, as it was rolling down?

A. Yes.

Q. When that signal was given? A. Yes.

Q. From the front of the car rolling down?

A. Yes.

Q. You mean to say that the front of the car that was rolling was 25 feet from the engine when Mr. Kline gave that signal?

A. May have been, and may not have been; may have been 20 feet.

Q. Would you say it was as much as 20 feet?

A. Yes.

Q. Now, what rate were the cars going that were rolling down the hill?

A. They were rolling very slow; I can't just say what the rate would be.

Q. At what rate was the engine going when going up to the Shannon switch?

A. About eight miles an hour before the stop signal.

Q. Now, you say that cars going at that speed on the main line and not less would have collided in ten seconds? A. Well, I don't know; may have.

Q. You might be mistaken about that rate?

A. It may be a mistake about the rate, but I know

(Deposition of Thomas J. St. Thomas.)

[596] it was a short time, and might be mistaken about the number of feet.

Q. It may have been less than that rate, and you might be mistaken about the distance? You are just guessing about it? A. I did not take the time.

Q. Were you still sitting on that car when the collision occurred?

A. I only had time to get onto the middle of the car.

Q. The middle of it? A. Yes.

Q. That was after the signal was given?

A. Yes, just at the time the signal was given.

Q. Where did you say Kline was then?

A. On the last car.

Q. He would be four car-lengths from you?

A. Four car-lengths from the engine.

Q. Did you notice him before that?

A. I noticed him when he gave me the signal to back up; gave the signal to back up; he gave me the high-ball signal to back up.

Q. And then you were watching him, as I understand you, when he gave this signal to stop on the switch? A. On the switch?

Q. Yes.

A. Why, he gave the sign to back up.

Q. Four cars had cleared and were by the switch on the main line?

A. Three cars had gone by and cleared on the main line [597] and passed by—

Q. At the time of the collision? A. Yes.

Q. Why hadn't the cars on the main line cleared

(Deposition of Thomas J. St. Thomas.)

with the car on the switch if there was one car that had not cleared the main line?

A. Because it had not run up that far; it had not run far enough to clear it.

Q. If the first car from the engine had not cleared the main line the cars coming down the main line, would they have collided with the cars instead of the engine? A. They would if they came far enough.

Q. I understand you to say that they could not clear.

A. All the cars cleared when they went up.

Q. All of them? A. Yes.

Q. What did you mean by saying that one car had not yet cleared when the accident occurred?

A. The way you spoke I took it going up the main line.

Q. How long had Mr. Clark charge of the switch engine at that time, if you know?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial.

A. A little over a year, I think.

Q. During all of this time he had charge of that switch engine and you were brakeman on that switch engine the brakes had never been set at this particular point on the main line? A. No.

[598] Q. Is it the duty of any particular brakeman to keep a look-out?

A. Supposed to be the crew's duty to keep a look-out.

Q. The whole crew? A. Yes.

(Deposition of Thomas J. St. Thomas.)

Q. Then that would be part of your duty, would it not?

A. If we were shorthanded; we were short one man on that day; left one man up on the hill; supposed to be with us.

Q. If that duty devolved upon the entire crew, why didn't you see that the brakes were set on these cars before the engine was disconnected from the remainder of the train with these cars?

Mr HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and already having been answered, and argumentative.

A. If I had done that the foreman would probably call me down and say I was butting in on his work.

Q. Then you would not feel it your duty to do that to avoid an accident?

A. If I thought it was going to cause an accident and be that serious I probably would have told him to do so.

Q. Have you had any correspondence with Mr. Clark recently on this subject? A. Not at all.

Q. Ever have any communication with him on the subject of this trial since you left there? A. No.

Q. How did you know you were going to be a witness here to-day?

[599] Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

A. Mr. Kearney wrote me a letter and told me he wanted me to be here to-day.

Q. Mr. Kearney tell you anything about what you

(Deposition of Thomas J. St. Thomas.)

would be expected to testify to? A. Nothing.

Mr. HARDINGE.—I make the same objection.

Q. Did he furnish you with a copy of the interrogatories that would be asked you here to-day?

A. No, sir.

Q. It is your opinion that the proximate cause of this accident was the failure to set the brakes on the cars which remained on the main line? A. Yes.

Q. And yet you worked there two years previous?

A. Yes.

Q. And they never rolled but twice?

A. Only twice before, not any one certain place, the lowest place of the track.

Q. Then your belief was that the real cause of the accident was the failure to set the brakes?

A. Yes.

Q. If they had been set the accident would not have happened?

A. If they had been set the accident would not have happened.

[600] Q. And you were the brakeman on that train? A. Yes.

Q. You knew that they were on the switch?

A. Yes.

Q. You knew that they were not set? You knew the cars would roll if they were not set?

A. At times they would do so.

Q. You consider that you discharged your duty by not setting those brakes?

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial, and not proper

(Deposition of Thomas J. St. Thomas.)

cross-examination.

A. I discharged my duty where I was on the car by passing the signal; that was the duty following the engine.

Q. You say that Mr. Clark at the time you saw him had a scratch over his left eye and had more or less blood on his face?

A. A little scratch over his left eye and blood running down, a very little bit.

Q. You are quite sure about that? A. Yes.

Q. Just as sure about that as anything you have testified to?

A I remember the time he rubbed his face to rub the blood off.

Q. You are positive about that? A. Yes.

Q. Who was present at that time?

[601] A. J. T. Yelly, Jesse Murphy, J. M. Kline, myself, Jack Chambers, and John Gatty.

Q Then those others would have had as good an opportunity to have seen that if there had been blood there? A. I suppose so.

Q. Did Mr. Clark walk off from there by himself?

A. No; they carried him a ways, probably a hundred or two hundred feet, and then he said he would try to walk, and we took hold of his arms and took him along.

Q. Did he complain of his head and face?

A. No; he complained of his hip and back, is all.

Q. No complaint about his head or eyes?

A. No, he did not say anything about his eye.

Q. What did you say your business was now?

(Deposition of Thomas J. St. Thomas.)

A Switching

Q. What company? A. Southern Pacific.

Q. Your headquarters are here in San Jose?

A. Pajaro.

Q. Which way—south from San Jose?

A. South; yes.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. HARDINGE.)

Q. The cause of the accident was the fact that Mr. Kline gave the stop signal as well as the fact that the brakes were not set on these cars?

[602] Mr. McFARLAND.—I object to that as leading and suggestive.

A. Yes.

Q. Who was the first man to reach Mr. Clark after the accident? A. The fireman, Jack Chambers.

Q. And then whom? A. Mr. Kelly and myself.

Mr. HARDINGE.—That is all.

(By Mr. McFARLAND.)

Q. Did you ever make a statement in regard to this accident? A. Yes.

Q. Did you testify in that statement you made anything about any scratch above the eye or blood?

A. No.

Mr. HARDINGE.—I object to that as incompetent, irrelevant and immaterial. The statement itself is the best evidence.

(Signed) THOS. J. ST. THOMAS.

[Deposition of John Freeman.]

[603] The deposition of JOHN FREEMAN, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY.)

Question 1. What is your name, age and occupation?

Ans. John Freeman; 44 years old, and am now running an engine for the Arizona & New Mexico Railway Company.

Question 2. Were you at any time employed by the defendant in this action?

Ans. I fired an engine for them for a year or such a matter. I don't know just how long.

Question 3. Covering what period were you an employee of the defendant in this action?

Ans. 1910, I guess it was.

Question 4. What period did it cover?

Ans. It was in 1910, two years back, or a year and a half.

Question 5. Have you frequently been over the defendant's railroad track in Clifton, Arizona?

Ans. Yes, sir.

Question 6. Are you well acquainted with and have you frequently been over that 800 feet of defendant's railroad track between the Shannon switch and the defendant's railroad bridge, which crosses the San Francisco River in **[604]** the town of Clifton, Greenlee County, Arizona?

Ans. Yes, sir.

Question 7. How many times have you been over that part of the road?

(Deposition of John Freeman.)

Ans. I cannot say. I have been over it several times. I have been over it, now—a hundred times is plenty, I guess.

Question 8. State whether or not if freight-cars were left on any part or near the middle of the northerly portion of this 800 feet between said switch and bridge, they would remain in the same block without the brakes having been set, or the same blocked.

Question objected to on the grounds that it calls for an expert opinion from the witness, who has not qualified as an expert; and, secondly, has not testified whether he knows whether the cars would roll or not.

Ans. I have known cars to move near the center of the track.

Defendant moves the Court to strike out the answer of witness as not being responsive to the question.

Question 9. How many times have you known cars on which the brakes were not set thereon or blocked to run on said 800 feet of said track?

Defendant objects to the question on the ground that it assumes that the witness has seen cars run on said track without them being locked or the brakes set.

[605] Ans. One time I saw the cars run and then another time I didn't see them, but I knew they were moved. I asked the foreman how much work there was for us to do; he said quite a good deal,

(Deposition of John Freeman.)
and I said we had better cut off then and go for water.

Answer objected to on the ground that it is based on hearsay.

Question 10. About what time was it that you say the cars moved on that part of the track?

Ans. I don't remember just exactly.

Question 11. Can you fix the year?

Ans. It was 1910.

Question 12. Those cars—were they freight-cars?

Ans. Yes, sir.

Question 13. Had they been left on the track without the brakes being set?

Ans. I suppose they were for they moved.

Defendant objects to the answer for the reason that witness has no personal knowledge.

Question 14. Did you examine the cars to see if the brakes were set or not?

Defendant objects to question on the ground that witness has not qualified as an expert.

By Mr. KEARNEY.—We withdraw the question for the present.

(By Mr. KEARNEY.)

[606] Question 15. Have you had experience as a railroad man? A. Yes, sir.

Q. 16. How much experience have you had?

Ans. I have been railroading for about eight years.

Question 17. Did you ever serve as a brakeman?

Ans. No, sir.

(Deposition of John Freeman.)

Question 18. In what capacity did you serve?

Ans. As fireman.

Question 19. During the year 1910 you was fireman on the road on an engine for the defendant company as a servant of the defendant?

Ans. Yes, sir.

Question 20. You was engaged in switching cars in Clifton? Ans. Yes, sir.

Question 21. I will ask you to state that if the cars had been placed on this 800 feet of railroad track of the defendant, that we have been talking about, and the brakes set on the cars would the cars have remained on that part of the track?

Ans. Yes, sir.

Defendant objects to the question for the reason that it calls for the opinion of witness, who has not qualified **[607]** as an expert, don't claim to be any and does not pretend to know whether the car was rolling or whether the brakes were set or were not set.

A. Yes, sir; they will stand with the brakes on—they were supposed to set the brakes.

The defendant moves the Court to strike out the latter part of the witness' answer for the following reason: that it is not responsive to the question.

Q. 22. How would it be on that part of the track if freight-cars were placed thereon without the brakes having been set, would the cars be liable to remain on that portion of the track?

Question objected to for the reasons that it calls for the opinion of the witness, he not having quali-

(Deposition of John Freeman.)

fied as an expert; not having testified that he has any personal knowledge of the matter.

Ans. There has been cars set there without brakes on them, but at this time that I saw those cars move we didn't take all that were on the track, but we pulled away from them and they followed us down.

Question 23. Would they roll or stay there?

Ans. They would roll, probably.

Question 24. When cars are left on grades, state whether or not the rules of the defendant require the brakes to be set thereon to prevent them running away.

[608] Defendant objects to the question for the reason that the rules are the best evidence.

Ans. Yes, sir; they set the brakes.

Question 25. Do the rules require it?

Ans. Yes, sir; they require it.

Question 26. On that part of the track that we have been talking about, this 800 feet, is it the duty of the employees when cars are left on that portion of the track to set the brakes on the cars?

Defendant objects to the question unless the witness has personal knowledge of the duties of the employees inquired about.

Ans. Yes, sir.

Question 27. Did the defendant, to your knowledge, ever take any active measures to enforce such rules in regard to cars left standing on said 800 feet of said track?

Defendant objects to the question for the reason that there is no evidence that the defendant ever

(Deposition of John Freeman.)

had any knowledge of cars being left standing.

Ans. No, sir; none that I know of.

Question 28. At any time when cars had run over said 800 feet of track by reason of brakes having been set thereon was John T. Kline or John T. Kelley present, or had either of them any knowledge that cars left on said 800 feet of track were liable to run away if the brakes were not set or chocked?

[609] Defendant objects to the question on that ground that it is irrelevant and immaterial what notice or knowledge Kline or Kelley had, and the same would not be notice or knowledge to the defendant.

Ans. I am not sure whether either one of these were present or not at the time I saw those cars, and I can't say what their knowledge was regarding it.

Question 29. Do you know whether they knew that that part of the track was downgrade?

Ans. I don't know. I could not swear that they did.

Question 30. Did you, yourself, know that it was downgrade?

Ans. Yes, sir, I knew the cars would run down.

Question 31. Did Paul Reisenger, superintendent for defendant's 800 feet of this track know it was downgrade?

Defendant objects to the question, for the reason that no evidence has been introduced to show that Paul Reisenger is superintendent of said track.

Ans. I can't say that he did.

Question 32. I understand you to say that you was about a year fireman on the engine in the railway ser-

(Deposition of John Freeman.)

vice of the defendant during the year 1910?

Ans. Yes, sir, I was with Mr. Clarke that long.

Question 33. State whether or not Mr. Clark readily [610] observed signals.

Question objected to by the defendant for the reason that it is both leading and suggestive.

Ans. Yes, sir.

Question 34. What do you say, at the time you was with Mr. Clarke, as to whether his eyesight was defective?

Defendant objects to question on the grounds that it is both leading and suggestive.

Ans. It was good, so far as I know. I never saw anything wrong with it.

Question 35. I will ask you to state if you know whether the plaintiff was a careful or a careless servant for the defendant.

Defendant objects to the question, for the reason that it is irrelevant and immaterial, and is both leading and suggestive.

Ans. He was very careful in all of his work.

Cross-examination.

(By Mr. McFARLAND, of McFARLAND and HAMMOND, of Counsel for Defendant.)

Question 36. What did you say you was doing for the defendant during the year 1910?

Ans. I was firing on an engine.

Question 37. Was that engine engaged in service in the yards or the main line?

[611] Ans. In the yards.

Question. 38. Do you remember what time in 1910

(Deposition of John Freeman.)

you entered the service of the A. & N. M.,—about?

Ans. It was about March.

Question 39. 1910? Ans. Yes, sir, 1910.

Question 40. Have you continued in the service of the company up to this date? Ans. Yes, sir.

Question 41. In the same capacity?

Ans. No, sir. I worked about 18 months as hostler in Nachita.

Question 42. At the time you entered the service in March, 1910, how long did you continue in their service as fireman? Ans. As fireman?

Question 43. Yes, sir,—how long?

Ans. I was here not quite a year until I went to Hachito.

Question 44. During that time was you fireman on an engine being run by Mr. Clarke?

Ans. Yes, sir, that was my regular job.

Q. 45. You was engaged in switching in the yards during that time? Ans. Yes, sir.

Question 46. What part of that time was you engaged [612] in switching cars up there on the Shannon switch?

Ans. That was every day that I was on the engine.

Question 47. Sometimes it was more than once a day?

Ans. Yes, sir, sometimes two or three times a day.

Question 48. You was engaged each time, then, engaged in firing for Mr. Clarke? Ans. Yes, sir.

Question 49. During all that time you was engaged in firing an engine in the yards in Clifton and up the Shannon hills you only saw cars shift on the

(Deposition of John Freeman.)

switch once? Ans. That is all.

Question 50. There were cars left standing on the main line, and there were cars taken off from the main line and switched up Shannon's switch every day? Ans. Yes, sir, every day.

Question 51. When Mr. Clarke was gone, were you on the engine when this was being done?

Ans. Yes, sir.

Question 52. He had charge of the engine and cars which were to be switched and took from the main line and switched them up the Shannon switch?

Ans. Yes, sir.

Question 53. Do you know the grade between the bridge [613] and up to the Shannon switch?

Ans. No, sir.

Question 54. You don't know what the grade was at the time you was working as fireman on Mr. Clarke's engine? Ans. No, sir.

Question 55. You don't know now?

Ans. No, sir.

Question 56. Do you know on what grade a car will stand without the brakes being set?

Ans. No, sir, I don't.

Question 57. Why, then, do you say that cars would roll on that grade, and you don't know what the grade was? Ans. I saw them roll.

Question 58. Once? Ans. Yes, sir.

Question 59. There were a great many hundreds and possibly thousands of freight-cars shipped from the main line up to the Shannon hill during the time you were firing on Mr. Clark's engine?

(Deposition of John Freeman.)

Ans. Yes, sir, a good many cars. I can't say how many.

Question 60. Would you during that time shift as many as a dozen cars from the main line up to the Shannon switch each day?

Ans. I don't know whether they would average that many,—sometimes we had more, sometimes less.

[614] Question 61. You could not approximate the average very well? Ans. No, sir, not very well.

Question 62. Mr. Clarke was always on the engine when you were present as fireman?

Ans. There were times he was not.

Question 63. During the time you was fireman, how many times would you say he was not on the engine when you were switching cars from the main line up Shannon's switch?

Ans. He was always present at those times.

Question 64. And the modes and methods of switching were always the same? Ans. Yes, sir.

Question 65. Mr. Clarke knew all the modes and methods by which cars were taken from the main line to the Shannon switch? Ans. Yes, sir.

Question 66. You knew the custom of the cars being moved, left on the main line, and the custom of switching cars from the main line up to the Shannon switch? Ans. Yes, sir.

[615]. [Deposition of H. B. Burke.]

The deposition of H. B. BURKE, omitting caption and certificate, is as follows:

Direct Examination.

(By L. KEARNEY, Attorney for the Plaintiff.)

Question 1. What is your name, age and occupation?

Ans. My name is H. B. Burke; my residence, Clifton, Arizona; my age, 54 years, and am a railroad agent.

Question 2. From February 1, 1911, to the present time, what position have you held with the defendant in this action?

Ans. Agent of the A. & N. M. at Clifton, Arizona.

Question 3. What has been and are your duties as such servant of the defendant?

Ans. It is to keep the accounts of the station, and any duties that come under the agent's jurisdiction.

Question 4. Have you as such servant charge of all freight records, bills of lading, invoices, shipping receipts of all freight consigned or sent in over its railroad from outside of the Territory, now the State of Arizona, and received at Clifton, Arizona, and consigned to persons at Clifton, Arizona?

Ans. I have charge of all the freight-books and freight accounts, the bills of lading going out, but we don't always get bills of lading on freight coming in, unless consigned to shippers' orders.

Question 5. Have you any records in your office of twelve certain freight-cars, some lettered A. T. & S. Fe. R. Co., meaning Atchison, Topeka and Santa

(Deposition of H. B. Burke.)

Fe Company, and some [616] lettered C. S. Ry. Co., meaning Colorado and Southern Railroad Company, and among those twelve some of the cars bearing the following numbers: 26120; 26179; 26164; 26206; 26228; 26238; 26139; 26276, which cars were loaded with coke or other merchandise billed from some point in Colorado, or beyond the State line of Arizona, and at the same time were in the defendant's yards at Clifton, Arizona, on March 15, 1911, and stamped consigned to the Shannon Copper Company at Clifton, Arizona?

Defendant objects to the question for the reason that at the date alleged there is no allegation in the plaintiff's second amended complaint or either of the complaints previously filed alleging any fact or facts showing or tending to show that the defendant was engaged at the date stated in interstate commerce, nor that the plaintiff at the date alleged was in the employment of the defendant and on said day engaged in interstate commerce.

Ans. I have the record of all except C. & S. 26276, which probably should be 26216 instead of 26276.

Question 6. Where were those cars shipped from?

Ans. Gray Creek, Colorado.

Question 7. That is, including the 12 cars I mentioned, all consigned to the Shannon Copper Company? Ans. Yes, sir.

Question 8. Were they all shipped in from Gray Creek, Colorado? Ans. The eight cars were.

Question 9. If they all contained coke would they have [617] come from Gray Creek, Colorado?

(Deposition of H. B. Burke.)

Ans. Not necessarily; they were getting coke from different places.

Question 10. Where?

Defendant objects to question for the reason that it is immaterial and irrelevant.

Ans. I think possibly some from Gray Creek, and possibly some from elsewhere, but I cannot tell without looking at the records for it.

Question 11. Were the ones of the Santa Fe lettered A. T. & S. F.? Ans. I do not know.

Question 12. Do you know whether or not there is a company known as the Atchison, Topeka & Santa Fe Railroad Company? Ans. Yes, sir.

Question 13. How does it mark its cars?

Ans. A. T. & S. F.

Question 14. Do you know of a company known as the Colorado and Southern Railroad Company?

Ans. Yes, sir.

Question 15. Do you know how it marks its cars?

Ans. C. & S.

Question 16. Does the defendant own any of those cars?

Defendant objects to the question unless witness knows of his personal knowledge.

Ans. I don't know.

[618] Question 17. From Gray Creek, Colorado, over what lines of railroad would these 12 cars, or eight cars, loaded with coke come from or over before arriving at Clifton, Arizona?

Ans. The eight cars in question came from C. & S., Fort Worth & Denver, Rock Island, El Paso & South

(Deposition of H. B. Burke.)

Western and the A. & N. M.

Question 18. This is the defendant's road?

Ans. Yes, sir.

Question 18½. The cars I have mentioned to whom were they consigned?

Ans. To the Shannon Copper Company from the shipper,—from the Victor American Fuel Company.

Question 19. From the point of Gray Creek, Colorado? Ans. Yes, sir.

Question 20. Have you copies of the shipping bills of coke brought into Clifton in any of these 12 cars?

Ans. No, sir.

Question 21. Did the defendant, on March 15, 1911, or at any time since, own any of the freight-cars which were used for carrying freight over its line of railroad, Hachita, New Mexico to Clifton, Arizona?

Defendant objects to the question on the ground that it is irrelevant and immaterial.

Ans. They have some cars; yes, sir.

Question 22. What kind of cars are these?

Defendant objects to the question on the ground that it is immaterial and irrelevant.

[619] Tank-cars, flat cars, and box-cars.

Question 23. Does the defendant own any such cars as carried coke in the said eight cars or 12 cars shipped from Gray Creek, Colorado, to Clifton, Arizona?

Ans. They have stock-cars,—coke shipped in stock-cars.

Question 24. Is it not a fact that about all the com-

(Deposition of H. B. Burke.)

merce for goods and merchandise that are shipped from points beyond the line of Arizona are brought in over the line of defendant's railroad to Clifton, Arizona, in foreign cars? Ans. Yes, sir.

Defendant objects to the question for the reasons that it is irrelevant and immaterial.

Question 25. I will ask you if, as shown on your records, the Shannon Copper Company has boughten any coke that was shipped in over the defendant's line of railroad in the Territory, now State, of Arizona?

Defendant objects to the question on the ground that it is irrelevant and immaterial.

A. Not that I know of.

Q. 26. All the coke that the Shannon Copper Company has boughten and shipped in over the defendant's line of railroad was made at points beyond the line of Arizona?

Defendant objects to the question for the reason that it is irrelevant and immaterial, and suggestive and leading.

A. So far as I know.

Q. 27. Are these papers—eight waybills from Gray Creek to Clifton—C. & S. 793, March 7, 1911; 792, same; 673, February [620] 28, 1911; 777, March 6, 1911; 775, March 6, 1911; 773, March 6, 1911; 772, March 6, 1911, true copies of the records of your office as the said agent of the defendant?

Ans. Yes sir.

Note: The above referred to waybills, eight in number, are marked respectively Exhibit "A," Exhibit

(Deposition of H. B. Burke.)

"B," Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "F," Exhibit "G," and Exhibit "H," and are attached hereto and made a part hereof.

Q. 28. And that exhibit, Exhibit "A," "B," "C," "D," "E," "F," "G" and "H," contain a record of the cars inquired about and which you have stated were shipped from Gray Creek, Colorado to Clifton, Arizona, consigned to the Shannon Copper Company? Ans. Yes, sir.

Cross-examination.

(By Mr. McFARLAND, of McFARLAND & HAMMOND, Attorneys for Defendant.)

Question 29. Are the exhibits that are filed copies of the original waybills or copies of the records?

Ans. Copies of the records from the expense bills or freight bills.

Question 30. And they are copies of copies in your office and are not copies of the original bills?

Ans. Yes, sir.

(By Mr. McFARLAND.)

Defendant moves the Court to strike from the files Exhibits "A" to "H," inclusive, for the reason they are copies [621] of copies made from copies and not from the originals.

(By Mr. KEARNEY.)

Question 31. What became of the originals?

Ans. We sent them to the general offices.

Question 32. Were these copies made out in the office and are they true copies?

Ans. The expense bill was not a true copy, for the reason that the expense bills do not show all the rout-

(Deposition of H. B. Burke.)

ing, but we in making these copies get them from the bills.

Question 33. It is your duty to keep a correct record in your office, is it not? A. Yes, sir.

Question 34. These records you have produced here you know from your own knowledge to be true records? A. Yes, sir.

Question 35. How long are the records kept on file in the Auditor's office?

Ans. I don't remember the exact date now, but it is over seven years.

Question 36. Do they keep them for seven years?

Ans. Oh, yes, they keep them.

Question 37. Did you have the originals before they were sent to the Auditor's office?

Ans. Yes, sir.

Question 37. You are positive that your record of them [622] is absolutely correct?

Ans. I think so, because we have no corrections on it so far as I know. I would be willing to bank on it myself. There is no room for all this routing on there, and consequently we left it off.

Question 38. Then you would say that all the other date is absolutely correct?

Ans. Yes, sir. The routing we have generally on another book and not on this particular book.

Question 39. It is a part of your duties to keep a correct record of the same? Ans. Yes, sir.

Question 40. And that which you have testified to now is a statement of that record?

(Deposition of H. B. Burke.)

Ans. Yes, sir.

(Signed) H. B. BURKE.

[623] And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

[624] Be it remembered that during the trial of this cause the further proceedings were had: The Court instructed the jury as follows:

[Instructions.]

"Gentlemen of the Jury, in this case the plaintiff seeks to recover damages against the defendant company for certain personal injuries caused, as he alleges, by the negligence of said company. The plaintiff says in his complaint that on March 15th, 1911, he was employed by and had worked for the defendant company at Clifton, Arizona, as a locomotive engineer. That on said day he was in charge of and operating as such engineer a switch engine of the defendant. That while so at work he and certain of his fellow-employees were engaged in moving a train of freight-cars from the yards of the defendant to the Shannon Smelter by way of what is known as the Shannon switch. That in the course of such work four of said cars were cut from the train and left standing on the main track of defendant's road without the brakes being set thereon or otherwise blocked. That soon thereafter, and while plaintiff was backing his engine with the attached cars on to said Shannon switch, the said four cars moved from the place where they had been placed and collided with said engine, and that as a result of said collision

plaintiff then and there received divers severe bodily injuries. That the defendant company failed in its duty to plaintiff in that its employees, fellow-servants of plaintiff, did not exercise due and reasonable care in the respect that [625] the brakes were not set upon said cars, or other available means taken to prevent their moving, and that the grade of such track at the place where said cars were placed, was such as to require the setting of said brakes, or the blocking of said cars, in some other way to securely hold said cars at the place where they had been so placed; and that the failure and neglect of the defendant, through its said employees, constituted negligence. The complaint further states that the employees of the defendant whose duty it was to warn plaintiff of any danger and of any unsafe setting of said cars failed to warn plaintiff of the danger, but gave him the wrong signal, and that the failure and neglect of the defendant, through its said employees, in the respects mentioned, constituted negligence, and constituted the direct and proximate cause of the collision and of the injuries received therein by plaintiff.

"The defendant in its answer denies that it was guilty of any negligence in the premises, and further alleges that any injuries plaintiff may have suffered at the time and on the occasion in his complaint set forth, were caused by his own negligence and want of care, and not by reason of the negligence or want of care of the defendant, its agents and servants. Defendant further sets up in its answer that any injury the plaintiff may have received was wholly the

result of the ordinary risks of said employment open to his observation, and hence were known to him or could have been known to him by the use of [626] ordinary care.

"Now, gentlemen, you will observe from the issues thus stated that negligence must be proven and established as the basis of any recovery in this case. Now, in a general sense, negligence is the absence of ordinary care—or, negligence may be otherwise defined as doing something which, under existing circumstances and conditions, a person of ordinary care and prudence would not do, or, on the other hand, omitting to do something which, under the existing circumstances and conditions, a person of ordinary care and prudence would have done. Whether negligence exists in any particular state of facts is a question for the jury, and so in this case it is for you gentlemen to say whether negligence has been established as charged in the complaint under the definition of negligence I have given you. Now, this case is governed by the acts of Congress approved April 22d, 1908, which, among other things, provided that every common carrier by railroad in the Territories shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said Territories, when such injury be occasioned in whole or in part by reason of the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, track, roadbed, works, or other equipment. The Statute further provides that in actions brought

against any such [627] common carrier by railroad under or by virtue of any of the provisions of the act to recover damages for the personal injury to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the negligence attributable to such employee. That is to say, the force of that statute is somewhat as follows (and perhaps can be best illustrated in this way): If the plaintiff be guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will then give an award of one-half of the damages it would have given if he had been free from negligence; or if he be twice as negligent as the defendant company, then one-third would be the proportion of the damages he shall receive, and so on, whatever the proportion may be.

"Now, gentlemen, under the issues raised by the pleadings in this case, you will consider whether the freight-cars which were being removed to Shannon Smelter were left on an inclined grade in defendant's track without the brakes having been set thereon or the same blocked to prevent their escape and possible collision with the engine on which the plaintiff was, and whether or not such failure to set such brakes or apply such blocks or brakes under the circumstances constituted want of ordinary care and constituted negligence. And you will also consider whether or not the employee whose duty it was [628] to warn the plaintiff at the time and place of any approaching danger, failed in his duty in that

respect by reason of failing to give the plaintiff the right and proper signal, and whether or not, if you so find, that constituted negligence under the circumstances. And if you find that defendant, through its agents and employees, in either or both of the particulars mentioned, was guilty of negligence, you will then determine whether or not such negligence was the direct or proximate cause of plaintiff's injuries. And these are the primary issues of fact which you are to consider in this case.

"Now, as I called your attention in stating the issues, the defendant sets up as a defense what is known as the assumption of risk. That is to say, it alleges that the defendant, in entering the employment of plaintiff and in remaining in its said employment, assumed the risks ordinarily incident to his said employment which he knew as an intelligent and reasonable person, or by the exercise of ordinary care would have known, and by remaining in his said employment with such knowledge, he took the chances or the risks incident to such employment. Now, I charge you in this behalf that the doctrine of assumption of risk means that if the company is guilty of negligence and that negligence produces a state of affairs that is dangerous, but that dangerous condition is open and apparent, then an employee who goes to work under those circumstances when the risks and dangers are open and apparent so [629] as to be readily observable by a person of his intelligence, by going to work without objection, he assumes that risk involved in that dangerous condition and cannot hold the company responsible for

even a defective condition. But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employee. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appreciated them. In determining this question, you have a right to take into consideration the nature of the employment the plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for making such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his services as such engineer also affected his capability of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

"Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that [630] the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would not have happened, then the fact that he is chargeable with the assumption of risk in a portion

of the dangers would not prevent recovery if the dangers with which he is chargeable would not in themselves have produced the injury.

"To the doctrine of assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arises in whole or in part from the negligence of any officer, agent or employee of the defendant.

"Now, if you find that the defendant was guilty of negligence in the particulars mentioned which directly contributed to the collision in which the plaintiff was injured, then you will consider the further question whether or not the plaintiff was guilty of contributory negligence. By contributory negligence is meant that the plaintiff himself in and about this occurrence was guilty of lack of ordinary care —in other words, guilty of negligence—and that the plaintiff's negligence contributed to the production of the injury so that without it the injury would not have occurred. If you find that a state of affairs existed so that but for the negligence of the plaintiff the accident would not have occurred, you will find he was guilty of contributory negligence. That **[631]** is, subject to the qualifications that if the contributory negligence or the negligence of the plaintiff was so willful and of such a character as that the jury might say it was the direct and proximate cause of the injury, then the plaintiff may not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being merely a contributing cause, was so gross, so willful

and extended to such an extent as that the jury may say it was the proximate and direct cause of the injury. If you so find it will be your duty to ascertain in what degree the negligence of the two parties contributed to bring about this result, and you will then diminish the amount of recovery by taking the full amount of damages which otherwise you would award and reduce it by the proportion in which the negligence of the plaintiff contributed to the injury, if you find he was guilty of contributory negligence under the definition of that term as I have given it to you.

"Now, the burden is upon the plaintiff to prove that the defendant was guilty of negligence and that that negligence caused the injury. The burden of proving the defense of contributory negligence is upon the defendant. By burden of proof I mean this: that the party who has the burden of proof must make out his case by a preponderance of the evidence —must make out the contention which it alleges—which he or it alleges—by a preponderance of [632] the evidence. By preponderance is meant the greater weight of the evidence—the more convincing force, or the greater probability. If you find on any question that the party having the burden of proof has made that out under all the evidence, taking into consideration all the evidence produced on both sides, so that the affirmative of that proposition seems more probable than the negative, then the burden of proof has been made out; but if there seems to be a greater probability of the negative, then the person having the burden of proof has

not made it out.

"The plaintiff did not assume the risk of the negligence of the defendant company for whom he was working, nor any of its servants, except such as I have already charged you was of such a nature as that he must be presumed to have known and appreciated it and assumed it as a necessary incident to his employment. The plaintiff had a right to assume not only that the railroad company defendant would perform its duty, but the plaintiff had a right to assume that each of the other employees would perform their duty, and if, while in the exercise of ordinary care, the plaintiff was injured by the negligence, in either or both of the particulars mentioned heretofore, of the defendant for whom he was working, or by the negligence in whole or in part of any of the servants of the defendant, plaintiff has a right to recover. And if you find from the evidence in this case that the plaintiff, Thomas P. Clark, while in the exercise of ordinary care, [633] relied upon the other servants performing their duties and was injured by the negligence in whole or in part of some other servants of the defendant in either or both of the particulars mentioned, your verdict must be for the plaintiff.

"If you believe from the evidence that the plaintiff, Thomas P. Clark, was in the defendant's employ as engineer on one of its engines and that while so employed he was injured by a collision between such engine and loose cars on the main line of the defendant's railway or at the switch as alleged in plaintiff's complaint; and if you further believe from the evi-

dence that the said cars escaped and ran down upon the main line, and that said cars while set out on the main line were on an inclined grade and did not have the brakes set or wheels blocked, and this failure to properly set the brakes or chock the wheels caused these cars to escape from such point; and if you further believe from the evidence that the defendant or its servants while in charge of said cars negligently permitted said cars to be and to remain upon said track at said point without having the brakes set or the wheels blocked, and that the failure to have the brakes set or the wheels blocked, if you believe there was such failure, was negligence on the part of the defendant, and that such negligence, if any, was the proximate cause of the collision and plaintiff's injuries, then you will find a verdict for the plaintiff.

[634] "I charge you further, gentlemen, that if at and immediately prior to the collision, the defendant company, by its switching foreman, promptly gave the plaintiff such warning signals as to a competent switching foreman would appear to be the best means of avoiding injury to the plaintiff, then the defendant company was not guilty of negligence in the giving of such warning and signals, even if it should afterwards appear that the danger might have been better averted by other or different warnings and signals.

"If the jury believes from the evidence *of* the condition of the track upon which the four cars in question were left standing was such that the defendant company did not know or had no reasonable ground

to believe that the said four cars would move toward the Shannon switch without motive power applied to them, then the defendant company was not guilty of negligence in leaving said cars on said track without setting the brakes thereon or otherwise obstructing the wheels of said cars.

"I charge you further that even if defendant left cars under the circumstances detailed in this case on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of collision, yet if plaintiff was warned of danger and was given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger [635] signal he could with the means at his disposal have stopped his engine and thus avoided the collision, and he then wilfully or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover.

"The defendant company is not required to use every possible means to insure the safety of its employees. If the jury believe that in this case the defendant used such care in the operation of the cars in question as a prudent man would use for his own safety, then the defendant company was not guilty of negligence and you should find for the defendant.

"The mere fact that the four cars left on the defendant's main track, without apparent cause moved after they had been stopped and the engine detached, does not of itself establish negligence on the part of the defendant company.

"If you believe that it was not reasonably to be expected under all the circumstances of the case that the cars in question would move, and that such movement could not have been reasonably foreseen, then it was not negligence in the defendant to so leave him.

"The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant company was guilty of negligence, and that such negligence was the proximate or immediate cause of the [636] injury complained of; and unless you believe that the plaintiff has established by a preponderance of the evidence in this case that the defendant was guilty of negligence, your verdict must be for the defendant.

"If after a consideration of all the evidence in the case, the jury believe that reasonable care for the safety of its employees did not require that the brakes should have been set or the wheels chocked on the four cars left on the main track of the defendant company while switching other cars up Shannon switch, and that the defendant company through its employees gave prompt notice to the plaintiff of the danger as soon as said four cars were discovered to be moving and made every reasonable effort to avoid the accident, then the defendant was not guilty of negligence and your verdict should be for the defendant.

"In case you find the issues in this case against the defendant you should then consider what injuries were suffered by the plaintiff in consequence of the collision in question and the burden is upon the plaintiff to prove by a preponderance of the evidence

that the injuries he complains of were the proximate result of the collision in which the plaintiff was injured, and you should award the plaintiff no damages for any injury or defect or affliction not proven by a preponderance of the evidence to be the proximate result of the injuries received in the collision in question.

[637] "If you believe the loss of sight of one eye complained of by the plaintiff was not caused by injuries received by plaintiff in the collision in question, but that such loss of sight either existed before such collision or resulted from disease of the plaintiff or other causes or existing before such collision, you should award plaintiff no damages by reason of such loss of sight.

"If after a consideration of all the evidence in the case you find the defendant company was guilty of negligence and that such negligence was the cause of or contributed to the injury suffered by plaintiff, if you further believe that the plaintiff was also guilty of negligence and that such negligence contributed to the causing of his injuries, then you should diminish the amount of damages you would otherwise award the plaintiff in proportion to the amount of negligence attributable to the plaintiff.

"The Court instructs the jury that if they find for the plaintiff and allow him damages, you should, subject to the rule stated as to the proper deduction in the case of contributory negligence on the part of plaintiff, allow him such sum as you believe from the evidence will compensate him for the injuries sustained; and in estimating his damages, you will take

into consideration the mental and physical pain suffered, if any, consequent upon the injury received, and the reasonable value of time lost, if any, consequent upon his injuries, including his reasonable [638] expenses for medical services, medicine and nurse hire, and the impairment of his eyesight or other physical injury, if any, consequent upon the injuries received.

"And if you believe from the evidence that his injuries are permanent and will disable him to labor and earn money in the future, or his physical condition has been impaired to labor and earn money in the future, then you may, in addition to the above, find such further sum as will be a fair compensation for his diminished capacity, if any, to labor and earn money in the future.

"In the ascertainment of damages the law does not lay down any definite mathematical rule. It says that you must be governed by sound sense and good judgment and make such award of damages as would be just compensation.

"Now, I submit two forms of verdict in this case. One to be returned in case you find for the plaintiff, and it will be subsequently as follows: 'We, the jury duly empanelled and sworn in the above-entitled action, on our oaths find for the plaintiff and assess such damages as you award him.' If your verdict be for the defendant, then you will use a similar form ending in the words, 'do find for the defendant.' "

The defendant in accordance with the permission of the Court theretofore granted it so to do, as before stated, in this bill of exceptions now upon the tender-

ing of this bill of exceptions states more fully and in detail the objections to said instructions as follows:

[Objections to Instructions.]

"But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious [639] as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employee. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appreciated them. In determining this question, you have a right to take into consideration the nature of the employment the plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for making such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his services as such engineer also affected his capacity of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

"Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would

not have happened, then the fact that he is chargeable with the assumption of risk in a portion of the dangers would not prevent recovery if [640] the dangers with which he is chargeable would not in themselves have produced the injury.

"To the doctrine of assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arises in whole or in part from the negligence of any officer, agent or employee of the defendant."

Because the grounds stated by the Court as exceptions to the general rule of the assumption of the risk as set forth in that particular charge of the Court as above stated are erroneous and do not constitute exceptions to the general rule of law on this subject. The only exception to the general rule of the assumption of the risk is, where the employee, with the knowledge of the defective or dangerous conditions incident to the service in which he is engaged, complains to the employer of the defective and dangerous condition and the employer promises to remedy or remove such dangerous or defective conditions, the employee may remain in the service of the company for a reasonable time for the employer to fulfill this promise, and during this period should injury occur, the employee would be relieved of the operation of this rule.

Defendant further objected to that part of the charge [641] as follows:

"To the doctrine of assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arises in

whole or in part from the negligence of any officer, agent or employee of the defendant," for the reason that the assumption of the risk is expressly limited by said instructions to defects of the works of the defendant and does not include the risks incidental to the operation of the business of the defendant which are open and obvious and were known to the plaintiff, and for the further reason that by section 4 of the Federal Employers' Liability Act of 1908, the only limitation of the principle of the assumption of the risk is where the injury or death of the employee results from the failure of the employee to observe the commands of the statute enacted for the safety of employees.

Be it further remembered that during the trial of this cause the further proceedings were had: The Court, in its charge, among other instructions, gave the following:

"That is to say, the force of that statute is somewhat as follows (and perhaps can be best illustrated in this way): If the plaintiff be guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will then give an award of one [642] half of the damages it would have given if he had been free from negligence; or if he be twice as negligent as the defendant company, then one third would be the proportion of the damages he shall receive, and so on, whatever the proportion may be."

For the reason that it was an evasion by the Court of the province of the jury in determining the proportion of the damages that should be diminished by

the jury due to the negligence attributable to the plaintiff.

Be it further remembered that at the trial of said cause and after the Court had instructed the jury as hereinafter stated, the defendant excepted to that part of the instructions of the Court reading as follows:

"That is, subject to the qualifications that if the contributory negligence or the negligence of the plaintiff was wilful and of such a character as that the jury might say that it was a direct and proximate cause of the injury, then the plaintiff could not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being a contributing cause was so gross, so wilful and extended to such an extent that the jury may say it was the proximate and direct cause of the injury."

[643] For the reason that there was evidence in the case tending to show that if the plaintiff had obeyed, as he was required to do under the rule of the railroad company and of the universal practice in like cases, of which the plaintiff had full knowledge, a signal denoting danger and requiring of him to instantly stop, and that if he had obeyed such signal, he could have stopped and averted the injury, that the charge erroneously instructed the jury, in effect, that such omission to obey such signal and order must have been wilful and intentional, whereas if the injury was the result of his negligent omission to obey said signal, such negligence was the proximate cause of his injury.

Be it further remembered that at the trial of this cause and at the proper time and before the jury retired, the defendant requested the Court in writing to instruct the jury as follows:

[Instructions Requested by Defendant and Refused.]

"If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of four cars to remain upon the main line after the engine had been detached therefrom, without having set the brakes thereon or having chocked the wheels so as to prevent their rolling by their own gravity, and if the plaintiff was apprized of danger of any kind by a signal which the plaintiff knew signified an emergency under the [644] practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case." Which instructions requested by the defendant were by the Court refused, to which action of the Court the defendant then and there excepted.

Be it further remembered that at the trial of said cause and at the proper time and before the time for the jury to consider of their verdict, the defendant requested the Court in writing to give the jury the following instruction:

"If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, then such movement must be attributable to accident, and if such movement was an accident the defendant is not liable in this case." Which instruction requested by the defendant was by the Court refused, to which action of the Court the defendant then and there excepted.

[645] Be it further remembered that at the trial of this cause and at the proper time and before the retirement of the jury to consider of their verdict, the defendant requested the Court in writing, in the presence of said jury, to give to the jury the following instruction:

"Even if the defendant left cars under the circumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if the plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover." But the Court refused to give said instruction, to which ruling of the Court in so refusing to give said instruction the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the jury

had retired to consider of their verdict, the defendant requested the Court in writing to give to the jury the following instruction:

"If after giving consideration to the condition of [646] the tracks in question and all the surrounding facts and circumstances proven in the case, the jury believes that at the time of the accident in question the condition of the track in question and the handling and moving of the cars in question thereon was being performed in the manner usually adopted in well-managed and operated railroads and generally recognized as good railroading, then the defendant was not guilty of negligence in so maintaining its railroad and operating its cars thereon in the manner in which it did so." But the Court refused to give said instruction, to which ruling of the Court in refusing to give such instruction the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the jury retired to consider of their verdict, the defendant requested in writing the Court to give to the jury the following instruction, that is to say:

"You are instructed that one entering into the service of the defendant with knowledge, actual or constructive, of the defects in the defendant's roadbed, or knowledge, actual or constructive, of the methods employed by the defendant in the operation of its cars in switching upon its main line, switches and industrial tracks, and remains in the service of the defendant with such knowledge, [647] actual or constructive, without complaint, that he assumes all

ordinary risks incident to his employment, and if injury results from such defects in its roadbed or by such methods of operation of its cars, that by such acquiescence he assumes the risk of injury, and cannot recover." Which instruction the Court refused to give, to which ruling of the Court the defendant then and there excepted.

And time was given, as hereinafter stated, within which the defendant could prepare and file its bill of exceptions to said rulings.

[Recital Re Exhibits.]

[647a] (Copy of Plaintiff's Exhibit 1 and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

(Copy of Plaintiff's Exhibit 2 and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

(Copy of Defendant's Exhibit "B" and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

(Copy of Defendant's Exhibit "A" and endorsements, original of which is transmitted in accordance with stipulation of counsel.)

[Order Extending Time to File Bill of Exceptions.]

[648] And be it further remembered that on the 22d day of November, and within the time allowed by the rules of this court for the preparation, allowance and filing of bills of exceptions, the parties to this cause, by their respective counsel, appeared in open court, and thereupon, upon motion of the defendant, further time, to wit, ten days from and after the 26th day of November, 1912, was given the de-

fendant by the Court within which to prepare, present and file its bill of exceptions to the rulings of the Court made at the trial of this cause.

And now, within the time aforesaid, so allowed therefor, to wit, on the 6th day of December, 1912, the defendant does now present this, its bill of exceptions, and asks that the same may be examined, approved and allowed by the Court, and filed and made and deemed to be and held a part of the record in this cause.

[Order Settling and Approving Bill of Exceptions.]

And on the 2d day of January, 1913, in the presence of the parties in open court, this being the day fixed by the Court therefor, the foregoing bill of exceptions is settled and approved by the Court, and, having been engrossed, now is signed and directed to be filed and made a part of the record of said cause.

Done in open court this 6th day of January, 1913.

RICHARD E. SLOAN,

Judge U. S. District Court for the District of Arizona.

[649] [Endorsements]: #14. (34.) Thomas P. Clark, Plaintiff, vs. The Arizona & New Mexico Railroad Co., a Corporation, Defendant. Bill of Exceptions. Served on W. M. S. Dec. 6, 1912. W. M. Seabury. Copy. Filed Dec. 21, 1912. Allan B. Jaynes, Clerk. Filed as engrossed and signed this 6th day of January, 1913. Allan B. Jaynes, Clerk.

[Acknowledgment of Service of Draft of Proposed Bill of Exceptions.]

[650] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY CO.,

Defendant.

The plaintiff hereby acknowledges service upon him this day of a draft of a proposed bill of exceptions in the above-entitled cause.

Dated Phoenix, this 6th day of December, 1912.

L. KEARNEY,
By W. M. SEABURY,
Plaintiff's Counsel.

[Endorsements]: No. 14. (32.) United States District Court, District of Arizona. Thos. P. Clark vs. A. & N. M. Ry. Co., Plff. Acknowledges Drft. of Defts. Proposed Bill of Exceptions. Filed Dec. 6, 1912. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

In the United States District Court for the District of Arizona.

AT LAW.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant.

Petition for Writ of Error.

And now comes the Arizona and New Mexico Railway Company, defendant in the above-entitled cause, and says that on **[651]** the 18th day of October, 1912, this Court entered judgment herein in favor of the plaintiff and against this defendant for the sum of Twelve Thousand Six Hundred Seventy-five ($12,675.00) Dollars and costs of suit, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf, out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings, and the papers of this cause, duly authenticated, may be sent to said Court of Appeals.

W. C. McFARLAND,
KIBBEY & BENNETT,
Attorneys.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Assignment of Errors.

The defendant, the Arizona & New Mexico Railway Company, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignments of **[652]** error which it avers were committed by the Court in the rendition of the judgment against the defendant and in the proceedings in said cause before and after the rendition of said judgment appearing in the records herein, that is to say:

I.

The Court erred in holding and deciding that the complaint and each count thereof stated facts sufficient to constitute causes of action against the defendant.

a. In this, it alleges no duty of the defendant and a breach thereof.

b. That the complaint nor either count thereof allege that the injury complained of was not one resulting from a risk assumed by the plaintiff in his employment.

c. That it appears from the allegations in each of

the two counts of said complaint that the defects complained of were open, obvious and apparent to one of ordinary intelligence.

d. That neither count of said complaint alleges that plaintiff did not know before and at the time of the injury of which he complains of the defect and insufficiency in the cars, roadbed, works, engines, appliances, tracks and other equipment of defendant or in the manner of the operation of its business, which may have caused or contributed to the cause of his injury.

That the Court erred in overruling defendant's objection made at the beginning of the trial, to the introduction of any evidence under either count of the complaint, because neither **[653]** count states facts sufficient to constitute a cause of action as specified in the first assignment of error.

II.

The Court erred in overruling defendant's special demurrer to plaintiff's complaint and each count thereof, because no facts were averred constituting negligence on the part of defendant in respect to its alleged failure to employ a sufficient number of brakemen, defective and unsafe roadbed, defective and unsafe coupling apparatus, failure to inspect, safe place, nor negligent and careless management of its cars and operation; nor does said complaint nor either count state facts showing or tending to show that the alleged defects caused or contributed to the cause of the injury complained of.

III.

In overruling defendant's motion to make said

complaint and each count thereof more definite and certain, by stating facts definitely and with certainty in what respect the number of brakemen employed by defendant was insufficient, and how said insufficiency, if any, caused or contributed to plaintiff's alleged injury; in what respect the roadbed was defective and unsafe, and how such defective and unsafe roadbed, if any, caused or contributed to the cause of plaintiff's alleged injury; in what respect was the coupling apparatus out of repair or unsafe, and how said want of repair or unsafe condition caused or contributed to cause the alleged injury; in what respect defendant failed to furnish plaintiff **[654]** a safe place in which to perform his work, and how such unsafe place, if any, caused or contributed to cause plaintiff's alleged injury; in what respect defendant and its servants negligently and carelessly ran, managed and operated its cars and engine, and how said careless and negligent operation, if any, caused or contributed to cause the alleged injury.

IV.

That the Court erred in overruling defendant's motion to strike out plaintiff's second amended complaint from the files because each count thereof is a duplication, in this, that thirteen separate and distinct causes of action are alleged in each of said counts, involving defendant's liability under the common law and two federal statutes; one the "safety appliance act," and the other the "Employer's Liability Act," each of said alleged causes of action requiring different proof to sustain and to

each of said causes of action separate and distinct defenses may be interposed; and as to said second count because the several separate and distinct causes of action therein are merely a summary of the several causes of action alleged in said first count.

V.

That the Court erred in overruling defendant's objection to any evidence in the cause, because said complaint nor either count thereof does not state facts sufficient to constitute a cause of action against the defendant, for the same reasons set forth under assignment of errors No. 1.

[655] VI.

That the Court erred in denying defendant's motion made at the close of plaintiff's evidence for a directed verdict for the defendant, for the reason that the causes of action, if any, of plaintiff, as alleged in the first and second counts of his said amended complaint, are based upon the first section of the "Employer's Liability Act," approved April 22d, 1908, in respect to injuries received by employees engaged in interstate commerce, and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce at the time of the alleged injuries. The undisputed evidence in the cause shows that plaintiff and defendant were engaged, at the date of the alleged action, in switching cars in its railroad yards at Clifton.

VII.

That the Court erred in sustaining plaintiff's ob-

jection to and excluding the testimony of witness Kelly offered by the defendant, by whom defendant proposed to show carelessness of plaintiff in handling his engine and disobeying signals while operating his engine in switching cars in the yards of defendant to sustain plaintiff's carelessness and negligence, defendant propounded to witness the following questions and the witness made answer thereto as follows:

Q. How long has Mr. Clark been operating that engine in switching cars there in that yard?

A. Well, I think up to that time about two years Mr. [656] Clark had been on that engine, around about that time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know of any instances prior to the accident, any within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—We except. Now, if the

Court please, we offer to prove by this witness that Mr. Clark for two years previous to this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

[657] Mr. SEABURY.—We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The COURT.—The ruling will stand.

Mr. McFARLAND.—It is denied?

The COURT.—Yes.

Mr. McFARLAND.—To which we except.

VIII.

That the Court erred in sustaining the objection of plaintiff to and excluding the testimony of witness Kline offered by defendant, by whom defendant proposed to show the general reputation of plaintiff as a safe and conservative engineer or as to his general reputation as a careless, reckless engineer. For the purpose of eliciting this testimony, defendant propounded to witness the following questions to which the witness made answer thereto as follows:

Q. You say you have known Thomas Clark how long? A. About fifteen or sixteen years.

Q. At Clifton?

A. No. I knew him in the Indian Territory.

Q. How long have you known him in Clifton?

A. A little over twelve years.

Q. Do you know his general reputation as to being a safe and conservative engineer or as to his reputation of being a reckless engineer in the operation of his engine?

Mr. SEABURY.—We object—it is clearly incompetent and [658] inadmissible.

The COURT.—I sustain the objection.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Do you know whether his methods and mode of operating his engine is of a safe and conservative character—I withdraw that—whether his mode of operating his engine in the yards of the company in switching cars is careful, or whether his method and mode of operating his engine in switching cars in the yards of the company is reckless and careless?

Mr. SEABURY.—We make the same objection, and we further object to the repeated offer of evidence which counsel must know to be incompetent, solely for the purpose of putting such inferences into the jury's mind—that constitutes reversible error.

Mr. KIBBEY.—We think that that statement is entirely uncalled for—we think this is competent evidence.

Mr. SEABURY.—We can't conceive of that being competent evidence.

The COURT.—Upon what theory do you think it is competent?

Mr. McFARLAND.—On his method and mode of operating his engine—he said he was careful.

The COURT.—Careful in what particular instances?

Mr. McFARLAND.—Generally.

[659] The COURT.—I don't recollect that he was asked as to that.

Mr. McFARLAND.—That goes to the question as to whether he was a careful, painstaking operator with his engine, or whether he was a careless and reckless man.

The COURT.—Suppose he was careless and reckless—you seek to establish something from which it may be inferred that he was careless and reckless in this particular instance?

Mr. McFARLAND.—Yes, sir, a fact from which the jury may infer whether this was careless and reckless or not.

Mr. BENNETT.—It seems to me the evidence is admissible in this view of the matter: Mr. Clark testified as also did Mr. Chambers, the fireman, that immediately on receiving the washout signal he shut off the steam and applied the air. The witness now on the stand testified that it was impossible for him to testify that that was true, he did testify that the exhaust was working when the engine reached the place of collision, which, if true, contradicts the statement of Mr. Clark that he shut off the steam. Now, in order, then, that the jury may determine which of these facts are true, the usual, habitual conduct of Mr. Clark in the operating of his engine or his usual and habitual manner of operating his en-

gine in such yards would be illustrative and would enable the jury to determine which would be the most likely to be true.

The COURT.—Possibly if this witness knows of instances of carelessness, that might go to the jury, but I doubt whether his opinion as to whether he is a safe operator is competent [660] evidence. I don't know of any instance where one workman was permitted to state his opinion as to whether the other fellow was a safe workman or not, or whether he had that reputation or not, unless that be the issue, as for instance, whether the employer was negligent in hiring him or suffering him to work so as to injure the lives of other workmen; but as establishing whether in a particular instance a workman was careless or otherwise, I know of no instance where proof of general reputation of that is admissible.

Mr. BENNETT.—Possibly not general reputation, but I understand he worked with Mr. Clark in the same switching crew and that he did know of his usual and general conduct in reference to switching and in handling his engine.

The COURT.—I should think as far as the matter could go in that way would be to admit proof of instances of like omissions to take the ordinary methods of caution, but not his impression—not his opinion—as to that matter.

By Mr. McFARLAND.—Note our exception.

(To the witness.)

Q. Do you know of Mr. Clark's habits—I withdraw that. Do you know whether as a general rule

Mr. Clark obeyed signals or whether he ignored signals?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—I think that the objection is equally good to that question.

[661] Mr. McFARLAND.—We except.

(To the witness.)

Q. Do you know of instances where Mr. Clark disobeyed signals?

Mr. SEABURY.—We object to that question also. The issue here is not whether Mr. Clark was careless about obeying signals.

The COURT.—Suppose the evidence be conflicting on that point? Suppose, assuming that the evidence indicates—the evidence put in by the defendant here indicates—that he didn't respond promptly to the signal to stop or didn't cut off the steam. Now, there is an issue of fact. Would it not, under that circumstance, be competent to show that in other instances the defendant was likewise slow to respond to the signal, or careless?

Mr. SEABURY.—We think not. Assume for the sake of argument that he was careless—careless on other occasions—yet on the occasion of the injury he might have been proceeding with care.

The COURT.—Would it lend anything to the probability of the case?

Mr. SEABURY.—We think not, and contend it is absolutely incompetent to receive such evidence, even assuming that they have it to produce, which we do not concede.

The COURT.—The individual element—the human element— [662] is a factor in all these matters—some men are slow or quick to respond to signals of danger. Now, how is the jury to determine which of these contributing theories of fact is the true one unless they have all the light that can be thrown on that including the individual factor?

Mr. SEABURY.—We want them to have all the light that can be thrown upon the issue here. We say all that light comes from the evidence of these witnesses as to what took place on this occasion, and that can be the only test.

The COURT.—But suppose those witnesses are sharply conflicting.

Mr. SEABURY.—Then it is for the jury to determine.

The COURT.—Then may they not consider which the more probable theory?

Mr. SEABURY.—That may be true, but we say they may not consider which is more probable if it is based on evidence which is not competent because it does not relate to the matter involved.

The COURT.—But Mr. Clark was there—he was the actor in the matter. Suppose his hearing or sight was bad and sharp hearing or sight had something to do with his conduct, would it not be admissible to show his defective hearing or acuteness of *sight* or defective sight or acuteness of sight as the case may be?

Mr. SEABURY.—We think not, and we say further in answer to that that if he had any defective

sight or hearing it was the duty of the defendant to discover it.

Mr. KIBBEY.—He can't complain of that.

The COURT.—This evidence is only admissible on the theory that it shows contributory negligence.

[663] (Thereupon the question is argued further to the Court, the further argument not being taken down by the reporter.)

Mr. SEABURY.—There is another ground of objection. Any question however framed, calling for other acts, practically asks the witness to state whether he exercised care on those occasions or not—the question is practically did he exercise care on other occasions.

The COURT.—I am in doubt about it. The objection will be sustained. I think it is safer.

Mr. McFARLAND.—We except. Now, I desire to put the question a little more definitely so as to get it into the record in better shape.

The COURT.—You may do so.

(By Mr. McFARLAND.)

Q. Do you know of any instances on other occasions previous to this accident where Mr. Clark failed or refused to obey signals given him?

Mr. SEABURY.—We make the same objection.

The COURT.—The objection is sustained.

Mr. KIBBEY.—May we, in order to preserve our record, state what we desire to prove?

The COURT.—I think it is already apparent. The argument has developed that.

Mr. McFARLAND.—If there is any doubt about it, we would like to state it.

Mr. SEABURY.—We object to the statement of what they desire to prove, and ask that counsel put their question to the witness. I shall object to any offer made for the purpose of a bill [664] of exceptions.

The COURT.—I think this conference is absolutely unnecessary. I think if a bill of exceptions is necessary to be prepared in this case the Court can find upon the record here enough without stating—repeating the statements—to put into the bill of exceptions to indicate the purpose of this offer. That is all you desire.

IX.

That the Court erred in that part of its charge limiting and qualifying the general rule of the assumption of the risk as follows:

"But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employee. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appreciated them. In determining this question, you have a right to take into consideration the nature of the employment that plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for mak-

ing such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his services as such engineer also affected his capability of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

[665] Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would not have happened, then the fact that he is chargeable with the assumption of risk in a portion of the dangers would not prevent recovery if the dangers with which he is chargeable would not in themselves have produced the injury.

To the doctrine of the assumption of risk should be added the further qualification that the plaintiff did not assume the risk of any danger which arose in whole or in part from the negligence of any officer, agent or employee of the defendant.

X.

That the Court erred in that part of its charge in reference to the rule of damages in stating that, "If the plaintiff is guilty of contributory negligence and his negligence and that of the defendant company be equal, the jury will then give an award of one half of the damages it would have given if he had been free from negligence; but if he be twice as negligent as the defendant company then a third will be the

proportion of the damages he will receive, and so on, whatever the proportion may be."

XI.

That the Court erred in instructing the jury on the [666] subject of negligence and contributory negligence as follows:

"That is, subject to the qualification that if the contributory negligence or the negligence of the plaintiff was so wilful and of such a character as that the jury might say that it was the direct and proximate cause of the injury, then the plaintiff could not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being a contributing cause, was so gross, so wilful and extended to such an extent as that the jury may say that it was the direct and proximate cause of the injury."

XII.

That the Court erred in instructing the jury that the omission of the plaintiff to obey a signal given him to stop, by the prompt obedience of which he might have stopped and averted the injury, must be "wilful and intentional" to exempt the defendant from liability for the alleged injury.

XIII.

That the Court erred in sustaining plaintiff's objections to the testimony of Dr. Stark, a witness offered by defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received at the date of the accident, and particularly as to the condition of plaintiff's eye, about two

months subsequent to the date of the alleged injuries, it not having been shown that the relation of physician and patient existed between the witness and the plaintiff at the time. The evidence as to the [667] incompetency and disqualification of the witness is as follows:

Dr. H. H. STARCK, being called as a witness in behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. KIBBEY.)

Q. What is your name?

A. Dr. H. H. Starck.

Q. Where do you reside? A. El Paso, Texas.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been engaged in the practice? A. Sixteen years.

Q. And where?

A. St. Louis and El Paso—two years in St. Louis and fourteen years in El Paso.

Q. Are you a graduate of any medical college?

A. I am a graduate of the medical department of St. Louis University.

Q. Have you had any other educational opportunities?

A. Yes, I had a certificate of work with the University of Vienna, the University of Prague, and the Royal London Opthalmic in London.

Q. Have you made any special department of medicine or surgery your business?

A. Eye and ear work.

[668] Q. For what length of time?

A. I have done nothing but that for the last six years.

Q. Do you know the plaintiff in this case, T. P. Clark? A. Yes, sir.

Q. How long have you known him?

A. I have known him since June a year ago.

Q. Where did you see him? A. At Clifton.

Q. At whose instance did you see him?

A. Mr. A. T. Thompson.

Q. Mr. Thompson was at that time connected with the defendant railway company?

A. Yes, sir. I don't know what his position was at that time—he was the head of it.

Q. He employed you to visit Mr. Clark, did he?

A. Yes, sir.

Q. Where did you see Mr. Clark?

A. At Clifton.

Q. Where in Clifton?

A. At the A. C. Hospital.

Q. Did you make any examination of him at that time?

A. Yes, sir, I made an examination of his eyes.

Q. State what examination.

Mr. SEABURY.—We object to the question, and ask leave to cross-examine this witness for the purpose of showing the [669] witness' disqualification and incompetency.

The COURT.—Very well.

(By Mr. SEABURY.)

Q. You say this examination took place in June, 1911? A. Yes, sir.

Q. At the hospital of the defendant company in Clifton? A. Yes, sir.

Q. Under the direction of Mr. Thompson?

A. Under his personal direction, you mean?

Q. Yes.

A. It was at his request I examined him. I came there especially for that purpose.

Q. Did Mr. Thompson or the defendant company conduct the hospital?

A. No, but it is the only place I have to make such examinations.

Q. You wouldn't go there and make an examination simply because Mr. Thompson said so?

A. Yes.

Q. Without consulting the medical force?

A. Yes, sir, if he wanted the case examined, because he is in charge of the whole road.

Q. Now, were you at that time in the employ of the defendant company? A. No, sir.

Q. Did you have any connection or affiliation with
[670] its medical department? A. No, sir.

Q. Or with its hospital? A. No, sir.

Q. Did Mr. Thompson pay you any fee?

A. He paid me for the examination.

Q. He did? A. Yes, sir.

Q. How long did the examination take?

A. Why, it probably took—I don't know—probably took a half or three-quarters of an hour.

Q. Did you recall what time of day it was?

A. You mean morning or evening?

Q. Yes.

A. No, I don't believe I do. I think it was in the

morning, though I am not sure.

Q. Who was present at the time you made the examination?

A. Mrs. Clark was present and—I don't know—you see the thing is situated this way: people are going in and out of the room all the time, so there might have been other persons present, perhaps Dr. Dietrich might have been present.

Q. Was this in a public ward of the hospital?

A. No, it is in the ex-ray room—the darkroom.

Q. In a single room you conducted the examination? A. Yes, sir.

Q. Who was present?

A. Mrs. Clark was present. I had a conversation with her at the time. I know during a large part of the examination there was no one there but Mr. Clark, Mrs. Clark and myself.

Q. In other words, no other doctor was present.

A. Dr. Dietrich might have come in.

Q. Just in and out?

[671] A. I am not positive—I know he wasn't there all the time.

Q. Did he participate in the examination?

A. No, he did not.

Q. Had you met Mr. Clark before that?

A. No, I never had.

Q. Who introduced you to him?

A. I don't know—it might have been one of the nurses. I don't know who introduced me. I don't remember. That has been a year and a half ago.

Q. Do you know how you were introduced to him?

A. What do you mean?

Q. I mean how you were introduced to him—in what capacity? A. Me?

Q. Yes. A. No, I don't.

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the introduction was done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

Q. You don't think you did?

A. I don't remember.

Q. Now, Doctor, don't you know, as a matter of fact, that [672] Mr. Clark assumed you were one of the regular physicians of the defendant?

A. I am not able to tell what Mr. Clark assumed.

Q. That is what I asked you. If you don't know, that is the answer. You didn't tell Mr. Clark you were from El Paso?

A. Now, I don't know whether I did or not. I think perhaps Mr. Clark knew it.

Q. How do you think he perhaps knew it?

A. I think in the conversation that occurred that he said he had heard of me.

Q. That was after you had gotten into the examination, wasn't it? A. I don't know when it was.

Q. You don't remember? A. No.

Q. What is your best recollection on that subject? Do you think you discussed El Paso before or after you began to examine him?

A. I don't remember.

Q. You have no recollection on that?

A. That wasn't the important thing to me.

Q. It might have been of vital consequence to him as it is now? A. I don't know.

Q. How long did your examination take?

A. Between half an hour and an hour.

[673] Q. Did you derive any information concerning his condition except at that examination?

A. The condition of his eye?

Q. I mean of his general condition.

A. Only the conversation with him.

Q. Only from conversations with him at that interview? A. Yes, sir.

Q. That is the extent of your knowledge and acquaintance of the facts of his case?

A. Of course I knew he was injured before I came up.

Q. So your only knowledge was derived at that interview? A. As to the condition of his eye?

Q. Yes. A. Yes, sir.

Q. Did you make any other examination except as to the condition of his eye?

A. Other than that?

Q. Yes. A. No.

Q. The information which he gave you—was the information which he gave you necessary to enable you to treat his eye or to properly diagnose his case?

A. No, I think I could have made a diagnosis without him saying anything about it.

Q. You think you could?

A. Yes, you understand that is part of the routine of the examination—questioning a patient.

[674] Q. In other words, that is the only method

you have of securing the subjective symptoms.

A. Yes—objective symptoms, of course, we discover ourselves.

Q. So you can say that all the subjective symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes, sir, that is right.

Mr. SEABURY.—Now, if your Honor please, I would like to call Mr. Thompson.

The COURT.—Very well.

A. T. THOMPSON, being recalled as a witness by counsel for the plaintiff for examination upon the question of the admissibility of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Thompson, Dr. Stark has testified that you requested him to call and examine the plaintiff. Had you ever secured any consent from the plaintiff to permit Dr. Stark to examine him? A. No, sir.

Q. Do you know whether Mr. Clark knew that Dr. Stark was not one of the regularly employed physicians of the defendant?

A. I don't know what he knew.

Q. You do not? Dr. Stark testified that you compensated him for his attendance upon Mr. Clark on this occasion. He didn't [675] mean that you compensated him out of your own pocket?

A. No, sir.

Q. You did not so compensate him? A. No, sir.

Q. Isn't it a fact that you compensated him out of the funds of the defendant? A. Yes, sir.

Q. Isn't it a fact that the funds came from the Hospital fund to which the plaintiff among others contributed? A. No, sir.

Q. From what fund did it come?

A. That was charged direct against the Arizona and New Mexico Railway, for it was in the nature of a special fee and wasn't subject to the society's fund.

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir, it did at that time.

Q. Will you please tell us what the privileges to workmen in the employ of the defendant included with reference to medical attention in such department?

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital? A. Yes, sir.

Q. That includes, of course, the diagnosis of a man's [676] injuries at the company's hospital?

A. Oh, yes.

Q. And there was no limitation or restriction, was there, as to the kind of medical attention which the company was to accord the injured employee?

A. No, there was no limitation, if I understood you right.

Q. No difference between a general and a specially employed doctor?

A. It is a recognized thing that the company has its own physicians and surgeons, and these are the men that attend to any patients—company patients—who may go into the hospital and who are entitled

under the fees they have paid into the society for their attendance.

Q. But the fact is, as you have already stated, that the defendant did compensate Dr. Stark for his medical attendance upon the plaintiff in this particular instance? A. Yes, sir.

Q. I ask if there was anything that you know of which would disclose or tend to disclose to the plaintiff any difference in Dr. Stark's connection with the defendant and other physicians who were in attendance uopn him?

A. I cannot conceive how Mr. Clark would connect Dr. Stark with the society in any way.

Q. It is a fact that the examination took place in the hospital?

A. So the doctor says. I don't know where it took place.

[677] Q. Is it the defendant's or the Arizona Copper Company's?

A. It doesn't really belong to the railroad company or the Copper Company. It belongs to the society. (By Mr. KEARNEY.)

Q. Has the society any legal existence as a copartnership or a corporation?

Mr. McFARLAND.—That is a legal conclusion.

Mr. KEARNEY.—Do you know as a matter of fact whether it has articles of incorporation?

The COURT.—What difference does it make?

Mr. KEARNEY.—My information is that it is only separate in name—neither a copartnership nor a corporation.

Mr. McFARLAND.—It is immaterial whether it is

a copartnership or a corporation.

The COURT.—I don't think that makes any difference here.

Mr. SEABURY.—I renew the objection already urged. I think we have shown the existence of the relation of patient and physician to have existed between this witness and the plaintiff.

The COURT.—I don't think you have shown the existence of the relation of physician and client. The best that you can say in that behalf is that the plaintiff may have understood that any communication he gave to the doctor that that relation existed. Under the testimony thus far adduced the fact is just otherwise.

Mr. SEABURY.—But, if your Honor please, we claim as a [678] matter of law that when a company undertakes to supply medical treatment to its employees who are injured and actually makes a reduction from the salary or wages of the employees—

The COURT.—I understand all that.

Mr. SEABURY.—That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The COURT.—That is unquestionably true, and on that theory I ruled out the declarations of Dr. Dietrich.

Mr. SEABURY.—We claim, further, that there is no difference as a matter of law between special employment and a general one.

The COURT.—I understand this examination was in reference to this lawsuit.

Mr. SEABURY.—There is no testimony to that effect.

The COURT.—The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. SEABURY.—I don't know what the purpose of it was.

The COURT.—If it was, of course then that ends it.

Mr. SEABURY.—Suppose it was for the purpose of negotiating a settlement, it would be improper for us to go into the purpose.

The COURT.—It must be established that he was Mr. Clark's physician.

Mr. SEABURY.—We admit that, but we think that under these circumstances he has the right to claim it.

Q. You don't think from Mr. Thompson's statement that the [679] employment of the doctor was under that society arrangement, whatever that was? He stated quite the contrary.

Mr. SEABURY.—I think it was a special arrangement, undoubtedly. He has testified the remuneration did not come out of that special fund, but I don't think that would change the course of conduct of the defendant.

The COURT.—The thing in my mind is simply this: Whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had a good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. SEABURY.—Then the surrounding circum-

stances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have been previously examined under in the hospital under a doctor of the association.

The COURT.—It doesn't make any difference where it occurred, in his house or elsewhere, if he was there as a hostile witness to get information—not for his benefit, but for somebody else'e benefit, and if the plaintiff understood that at that time, he certainly—the communication, whatever it was, was certainly not privileged.

Mr. SEABURY.—May I ask if the plaintiff understood that there was no difference between this doctor and Dr. Dietrich, for example? Would that effect the court?

[680] The COURT.—I am inclined to think so. The only thing is whether the circumstances were such as to put Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physician, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. SEABURY.—May I call the plaintiff to ascertain what he understood in this matter?

The COURT.—Yes.

THOMAS P. CLARK, the plaintiff, being recalled as a witness by counsel for the plaintiff upon the question of the admission of the testimony of the

witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY.)

Q. Mr. Clark, do you remember the day Dr. Stark examined you?

A. I remember him examining me very well.

Q. Had you ever seen him before that?

A. No, sir.

Q. Had you been examined by any other doctors of the defendant in the same place? A. No, sir.

Q. You never had? A. No.

[681] Q. You knew, however, that that was the hospital? A. Yes, sir.

Q. Did you know where the hospital was and what it was? A. Yes, sir.

Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which injured employees of the defendant are examined?

A. Yes, sir.

Q. Did you know that to be the fact at the time of your examination? A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Stark?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it.

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you in reference to the purpose for which that examination was requested or required? A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company or for your benefit?

[682] A. I don't know.

Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

Q. Is that what you understood? A. Yes.

Q. Did you or did you not believe that Dr. Stark was in consultation with Dr. Dietrich, your attending physician? A. Yes, sir.

Mr. KIBBEY.—You are leading him right along.

The COURT.—I think the communication is privileged—I will sustain the objection.

(By Mr. KIBBEY.)

Q. You say Dr. Dietrich was there?

A. He might have been in and out.

Q. As a matter of fact he wasn't in town, was he?

A. Yes, sir, I think so.

Q. You had a conversation with Dr. Stark, didn't you? A. Yes, sir.

Q. In the course of that conversation did you state to Mr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. KIBBEY.)

Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

[683] Mr. SEABURY.—We make the same objection.

The COURT.—Same ruling.

(By Mr. KIBBEY.)

Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work or anything of that kind?

Mr. SEABURY.—We object.

The COURT.—Is this a general examination—isn't it as to this matter of the competency of this doctor?

Mr. KIBBEY.—I am trying to get to the matter of the competency of this doctor.

Mr. SEABURY.—The question is did you have any talk with the company. I don't see what—

The COURT.—You may answer.

The WITNESS.—No, sir.

(By Mr. KIBBEY.)

Q. You had not had any talk with any of them up to that time? A. No, sir.

Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye?

A. I told Dr. Dietrich about it and he made the appointment with the doctor, I suppose.

Q. Didn't Dr. Dietrich tell you the company wanted an examination made for their information as to your condition [684] and didn't you so understand it?

Mr. KEARNEY.—We object to that as a privileged communication.

The COURT.—I overrule the objection.

The WITNESS.—I told Dr. Dietrich about it and he tried to examine it himself, and then he made the date with Dr. Stark a few days afterwards.

Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?

A. I supposed that was the object—very likely.

Q. You understood when the examination was made that it was for the purpose of getting information for the company? A. Yes.

Mr. KIBBEY.—Now, we think it is competent.

The COURT.—The answer is contradictory to the other.

Mr. SEABURY.—Absolutely, your Honor.

Mr. KIBBEY.—Yes, it is.

Mr. SEABURY.—However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness' testimony both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.

Mr. KIBBEY.—I think it is quite obvious to the contrary.

[685] Mr. SEABURY.—We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know—

The COURT.—I will put a question.

(To the witness.)

Q. What did you understand was the object of this examination of your eyes?

A. To know whether it was injured or not.

Q. What difference did it make whether it was injured or not in your judgment?

A. It would make a whole lot.

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it? A. I did.

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Dietrich he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared there.

Mr. SEABURY.—We think that makes it too clear, your Honor.

The COURT.—I think so.

[686] (By Mr. KIBBEY.)

Q. Did you know that Dr. Stark did not belong to the society's corps of physicians? A. To what?

Q. To the society's staff?

A. No, I didn't know anything about it.

Q. Had you ever seen him before?

A. Not that I know of.

Q. Did you ever hear of his attending anyone else there before?

A. You say Dr. Dietrich or Dr. Stark?

Q. Dr. Stark.

A. I never heard of him at all.

Q. Had you heard of him before?

A. No, sir.

Q. You knew he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Dietrich

said he would have their man.

Mr. KIBBEY.—That is all.

XIV.

That the Court erred in refusing to give to the jury instructions offered by the defendant as follows, to wit:

"If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of [687] four cars to remain upon the main line after the engine had been detached therefrom, without having set the brakes thereon or having chocked the wheels, so as to prevent their rolling by their own gravity, and if the plaintiff was apprized of danger of any kind by a signal which the plaintiff knew signified an emergency under the practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case."

"If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, then such movement must be attributable to accident, and if such movement was an accident, the defendant is not liable in this case."

"Even if the defendant left the cars under the cir-

cumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so, then the negligence of the defendant if any, is not the proximate [688] cause of the alleged injury, and the plaintiff cannot recover."

"If after giving consideration to the conditions of the tracks in question, and all the surrounding facts and circumstances proven in the case, the jury believes that at the time of the accident in question the condition of the track in question and the handling and moving of the cars in question thereon was being performed in the manner usually adopted in well-managed and operated railroads and generally recognized as good railroading, then the defendant was not guilty of negligence and in so maintaining its railroad and operating its cars thereon in the manner in which it did so."

"You are instructed that one entering into the service of the defendant with knowledge, actual or constructive, of the defects in the defendant's roadbed, or knowledge, actual or constructive, of the methods employed by the defendant in the operation of its cars in switching upon its main line, switches and industrial tracks, and remains in the service of the defendant with such knowledge, actual or constructive without complaint, that he assumes all ordinary

risks incident to his employment, and if injury results from such defects in its roadbed or by such methods of operation of its cars, that by such acquiescence he assumes the risk of injury, and cannot recover."

XV.

Because the Court further erred in that part of its charge wherein it instructed the jury that in order to relieve the [689] defendant from liability on account of negligence, the negligent conduct of the plaintiff must be wilful and wanton.

XVI.

Because the damages assessed by the jury are excessive.

XVII.

That the evidence at the trial was insufficient to justify the verdict of the jury.

XVIII.

That the verdict of the jury is against the law.

XIX.

That the Court erred in sustaining objections to testimony of Dr. Dietrich, whose deposition was offered in evidence, for the reason that the objections offered by plaintiff on the ground that it was privileged were waived by the plaintiff by filing cross-interrogatories to be propounded to witness, and the further reason that it was not shown that the relation of physician and patient existed between witness and plaintiff covering the time of treatment. The evidence *as this* relation is as follows:

Following is the stipulation:

[690] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

STIPULATION.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in this action, that the deposition of Dr. Henry Dietrich, a witness on behalf of the defendant, be taken before any person authorized to take depositions as provided for and designated under the provisions of subdivision 3 of Section 2515 of the Revised Statutes of Arizona, 1901, in any part of the world; that the direct and cross-interrogatories hereto attached shall go out with this stipulation, and the same propounded to said witness, and hereby waiving the issuance of any commission; that the deposition of said witness when so taken and returned may be read in evidence in this cause subject to the same objections and exceptions, as if said witness were personally present on the stand; that said deposition when so taken shall be certified to by the officer taking the same, and shall be enclosed in an envelope addressed to the Clerk of the United States District Court, at Phoe-

nix, Arizona, U. S. A. This deposition may be used by either party to this cause.

Dated April 1st, 1912.

McFARLAND & HAMPTON,
Attorneys for the Defendant.
L. KEARNEY,
Attorney for the Plaintiff.

[691] Mr. McFARLAND.—If the Court please, we offer the deposition of Dr. Dietrich.

Mr. SEABURY.—We object to the offer in gross. This deposition was taken under a stipulation which expressly reserved all objections to the questions and answers the same as if the witness were personally present.

The COURT.—Who is Dr. Dietrich?

Mr. SEABURY.—He was the attending physician.

The COURT.—On what do you base your objection?

Mr. SEABURY.—We object to the offer in gross on the ground that the deposition was taken under stipulation and not in the usual course, and that the stipulation expressly reserved—

The COURT.—I understand; but what do you wish to object to now?

Mr. SEABURY.—We wish them to read such portions of it as they desire.

The COURT.—I thought that you objected to it in gross.

Mr. SEABURY.—I only objected to the offer in gross, if your Honor please.

The COURT.—Oh, very well.

Thereupon defendant's counsel reads from the deposition of Dr. Henry Dietrich, reading the interrogatories and answers from number one to number nine, inclusive, without objection on the part of plaintiff's counsel, as follows:

Q. 1. What is your full name?

[692] A. Henry Dietrich.

Q. 2. What is your business?

A. Physician and surgeon.

Q. 3. If you say physician and surgeon, please state how long you have been in the practice of medicine and surgery and what place you have practiced your profession.

A. Since 1898. Chicago, 1898–1900; Wardner, Idaho, 1900–1902; Morenci, Arizona, 1902–1906; Clifton, Arizona, 1906–1911.

Q. 4. State what medical college or colleges you attended and if you have diplomas from same.

A. Northwestern University Medical College, and Rush Medical College, Chicago; Diploma from Rush Medical College and Presbyterian Hospital, Chicago, Post-graduate study, Berne, Switzerland, 1906.

Q. 5. What experience have you had in surgery and at what place?

A. House physician and surgeon, Presbyterian Hospital, Chicago, 1898–1900; assistant surgeon, Warden Hospital, Warden, Idaho, 1900–1902; surgeon Longfellow Hospital, Morenci, Arizona, 1902–1906; chief surgeon Clifton Accident Benevolent Association Hospital, 1906–1911.

Q. 6. State the time covered in each place and the class or classes of cases in which you have had surgical experience.

A. Time as given under interrogatory 5. My experience covered the field of general surgery; it was not limited to any class of cases.

[693] Q. 7. Did you ever reside in the town of Clifton, Greenlee County (formerly Graham), State of Arizona? A. Yes.

Q. 8. If you say you did, state the time covered by this residence. A. 1906–1911.

Q. 9. If you say that you did at one time live in Clifton, state, if you can, the time that you left and where you have been since and what has been your business since you left.

A. I left in August, 1911. Went to Chicago and sailed for Europe in September, 1911. From October 1 to March 30, resided at Berlin, Germany, and from April 1st to date at Zurich, Switzerland. In both places I have been doing post-graduate medical work, principally on diseases of children.

Q. 10. State the object of your leaving, what you have been doing since you left and what you are now doing.

Mr. SEABURY.—We object to the statement of the object, although I don't think that it is material.

The COURT.—You may read the answer.

A. To do post-graduate medical work. I have been working in hospitals and am now doing so.

Q. 11. State when you will return.

A. I do not know.

Q. 12. If you say that you will return, at what place do you expect to locate.

A. I have not chosen a location. Some large city.

[694] Q. 13. State whether you were ever connected in any capacity with the Arizona and New

Mexico Railway Company, whose principal place of business is in Clifton, Arizona. A. Yes.

Q. 14. If you say that you were connected with this company, state in what capacity.

A. Chief surgeon of medical department.

Q. 15. If you say with the medical department of this railway company, please state what position you occupied in the medical department and how long.

A. Chief surgeon since 1906.

Q. 16. If you say that your position was that of chief surgeon with this company, state when this relation commenced and how long it existed.

A. From 1906 until August 1st, 1911.

Q. 17. Do you know one Thomas P. Clark?

A. Yes.

Q. 18. If you say that you do, state how long you have known him, what position, if any, he occupied in the service of the Arizona and New Mexico Railway Company.

A. Since 1906. Locomotive engineer.

Q. 19. If you know, please state how long he was in the service of the company and in what position.

A. I cannot state the exact number of years he was employed.

Q. 20. If you say in answer that you do know Mr. Clark, and that he occupied the position of engineer in this company, [695] state how long he was in this service as engineer.

A. I cannot say how long he was employed as engineer.

Q. 21. Do you know anything of an accident to Mr. Clark on or about the 15th day of March, 1911?

A. Yes.

Q. 22. If you say that you do, please state whether or not you saw Mr. Clark on that date, if not on that date, state when you first saw him after the accident.

A. I am under the impression it was Thursday, March, 16th. I saw him on the day of the accident about 10 o'clock A. M.

Q. 23. If you say that you did see him on the date of the accident or some date subsequent thereto, please state whether you examined Mr. Clark with reference to any injury he received on that occasion.

A. I did.

Q. 24. Describe particularly, if you can, the exact condition of Mr. Clark in respect to injury or injuries as you found them on the date of your examination.

Mr. SEABURY.—We object on the ground that it appears from the examination of this witness that he is incompetent to testify concerning the injuries received by Mr. Clark, under paragraph 2535, Revised Statutes of Arizona, 1901.

The COURT.—Yes.

Mr. KIBBEY.—It is not apparent that Mr. Clark was a patient of his.

[696] The COURT.—Isn't it apparent that he visited Mr. Clark to make the examination as a physician?

Mr. KIBBEY.—He might even do that.

The COURT.—Not if he was a physician and in charge of the case.

Mr. KIBBEY.—There is no evidence of that.

The COURT.—That will have to appear before

the evidence can go in, that he was not.

Mr. KIBBEY.—The presumption does not follow that he was, although the fact is that he was.

The COURT.—The evidence is already in that he was the physician in charge of the case. Mr. Clark said Dr. Dietrich called upon him. The objection is sustained.

Mr. KIBBEY.—We desire to except to the ruling of the Court.

Q. 25. Please state whether or not you treated Mr. Clark as physician or surgeon for the injuries you have described. A. I did.

Q. 26. If you say that you did, when did this treatment begin and when did it end?

Mr. SEABURY.—We object to that as within the scope of the objection already pointed out.

The COURT.—Yes.

Mr. KIBBEY.—By admitting the other questions, hasn't he waived his objection to subsequent questions along the same lines?

The COURT.—They can waive all of it or any part of it. [**697**] They have a right to object to any portion that you see fit to offer. It is within the province of the plaintiff to waive the privileged nature of the communication.

Mr. McFARLAND.—The position we take is that by crossing these interrogatories and permitting the witness to be examined without objection, that they waived that right.

The COURT.—My understanding was that the stipulation expressly reserved that.

Mr. McFARLAND.—Not what they stipulated to

do, but what they did do—that they went on and asked a number of questions—thirty or forty cross-interrogatories—and they were answered by Dr. Dietrich. Now, it seems to me that the position that the plaintiff would be in in respect to depositions taken before an officer would be the same as though the witness were present in court. They have the right to object to them but they didn't do it. The stipulation would be equivalent to the legal proposition that they could permit or waive.

The COURT.—Where is the stipulation?

Mr. SEABURY.—(Handing the stipulation to the Court.) That is as to the original deposition. Of course we were obliged absolutely to take the cross-examination at that time, and our stipulation went to the objections at this time.

[698] The COURT.—(After reading the stipulation.) I think the stipulation covers—reserves the right to object.

Mr. McFARLAND.—I think that is true, but I think it is a privilege that he might exercise or might not at his direction.

The COURT.—At this time, I think.

Mr. McFARLAND.—Please note our exceptions.

Q. 27. State where Mr. Clark was during the period covered by this treatment.

Mr. SEABURY.—We urge the same objection.

The COURT.—Same ruling.

Mr. McFARLAND.—Exception.

Q. 28. If you say that you found on your examination, injuries to his ribs, state on which side the injuries were to the ribs, the number of ribs involved

and the result of the treatment in this respect. (Same objection—same ruling—exception.)

Q. 30. If you say there were any injuries to the kidneys or either of them, state the result of your treatment. (Same objection—same ruling—exception.)

Q. 31. If you say there were bruises over the sacral-iliac joint, state the condition in this respect and the result of your treatment. (Same objection—same ruling—exception.)

Q. 32. You may state in detail, if you know the exact condition you found Mr. Clark in when you first examined him or treated him for the several injuries you have described and the result of this treatment. (Same objection—same ruling— [699] exception.

Q. 33. If you examined his urine on the date of your first examination, you may state what you found in this respect, and the condition of his urine during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 34. State his temperature on the date of your first examination and during the time covered by your treatment. (Same objection—same ruling—exception.)

Q. 35. State whether you examined his pulse at the date of your first examination and during your treatment of him and if there were any indications of any disease or affliction of Mr. Clark other than those in reference to the injuries you have described. (Same objection—same ruling—exception.)

Q. 36. State whether you examined his lungs at

the date of your first examination and what were their condition. (Same objection—same ruling—exception.)

Q. 37. State if you know, if there were any indications of pneumonia in either of his lungs at the time you first examined them, or at any time covered by your treatment. (Same objection—same ruling—exception.)

Q. 38. If you say there were, state whether you treated him in this respect and the result of your treatment. (Same objection—same ruling—exception.)

Q. 39. If you say that you examined Mr. Clark at the date of the accident or afterwards, state whether there were any marks of violence or bruises on his head, face or eyes or [700] either of them. (Same objection—same ruling—exception.)

Q. 40. State whether at the time of your first examination, or afterwards during your treatment of him, he made any complaint or called your attention in any way to any trouble with his eyes or either of them.

Mr. SEABURY.—We object.

The COURT.—Same ruling.

Mr. KIBBEY.—Just a minute. Please read that question again. (Counsel reads the question.) We think that is competent, and made so by the testimony of Mr. Clark.

The COURT.—I don't think that changes the rule. It is not a question of whether it is contradictory in its nature or not, but it covered the whole subject matter.

Mr. KIBBEY.—It takes away from it the nature of privilege.

The COURT.—I think not, under the rule. My understanding is that the whole matter is privileged whether there are thirty people present or not.

Mr. KIBBEY.—The books state otherwise. If it is made in the presence of a number of people it shows that the patient doesn't care.

The COURT.—I think it covers the whole matter of communication as well as examinations, treatment, what he may have discovered, no matter if there be other sources of knowledge upon the same matter or not.

Mr. KIBBEY.—This is directed to a communication or lack of communication.

The COURT.—That is especially excepted.

[701] Mr. KIBBEY.—We take exception.

Q. 41. If you say he did, please state if you treated his eyes or either of them and the result of this treatment. (Same objection—same ruling—exception.)

Q. 42. If you say in answer to the above interrogatory that he complained of his eyes or loss of sight of his eyes or either of them, state whether you treated him for any trouble of his eyes and particularly with reference to the loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 43. Please state whether or not at the first examination you made of Mr. Clark or at any time subsequently during your treatment of him, did you discover any trouble with his eyes or either of them, or

whether he ever complained during the time covered by your treatment, of any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 44. State if at any time covered by your treatment of Mr. Clark for the injuries received, either during your treatment of them or at any time subsequent, did he complain of any trouble with his eyes or any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 45. If you say that he did, at a subsequent date, please state that date as near as you can remember. (Same objection—same ruling—exception.)

[702] Q. 46. If you state that Mr. Clark occupied quarters at his home in Clifton during your treatment of him for the injuries received, in this accident, state whether during that treatment he used his eyes in reading while confined to his home. (Same objection—same ruling—exception.)

Q. 47. If you say he did, state the extent to which he used his eyes in this respect or otherwise. (Same objection—same ruling—exception.)

Q. 48. State whether during this time he made any complaint or called your attention to any defect or loss of vision of his eyes or either of them. (Same objection—same ruling—exception.)

Q. 49. You may state in a general way or in detail any fact or circumstance connected with your treatment of Mr. Clark for injuries received as a result of this accident and particularly in reference to any trouble with his eyes or loss of vision while

under your care as a patient, that you may consider proper or necessary in order to get at the facts in this case, as though you were especially interrogated in respect to same. (Same objection—same ruling —exception.) And this concluded the reading of the direct interrogatories.

Mr. SEABURY.—We offer no cross-examination, and we expressly offer no cross-examination in view of the Court's ruling.

[703] XX.

That the Court erred in overruling the defendant's motion for a new trial, for the reasons averred above in the more specific assignment of errors herein contained.

Wherefore the defendant says that for said manifest errors the judgment of the Court should be reversed.

W. C. McFARLAND and
KIBBEY & BENNETT,
Attys. for Defendant.

[Endorsements]: No. 14. (36.) In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Petition for Writ of Error and Assignment of Errors. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

[Order Allowing Writ of Error, etc.]

In the District Court of the United States for the District of Arizona.

AT LAW—No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant.

And now comes the defendant, by its attorneys, and filed **[704]** herein and presented to the Court, its petition, praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers, from which the judgment was entered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon defendant giving bond, according to law, in the sum of Twenty Thousand ($20,000.00) dollars, which shall operate as a supersedeas bond.

February 24, 1913.

RICHARD E. SLOAN,
Judge.

[Endorsements]: No. 14. In the District Court of the United States in and for the District of Ari-

zona. Thomas P. Clark, Plaintiff, vs. The Arizona & New Mexico Railway Company, Defendant. Order Allowing Writ. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

In the District Court of the United States for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: [705] That we, The Arizona and New Mexico Railway Company, as principal, and American Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Arizona, surety, are held and firmly bound unto Thomas P. Clark, defendant in error, in the full sum of Twenty Thousand ($20,000.00) Dollars, the same being the amount of the supersedeas bond fixed by the District Court of the United States for the District of Arizona by order duly entered on the records of said Court on February 8th, 1913, to be paid to the said Thomas P. Clark, defendant in error, his heirs, legal repre-

sentatives or assigns, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators, legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this, this 24th day of February, in the year of our Lord, one thousand nine hundred and thirteen.

WHEREAS, on the 18th day of October, 1912, at the District Court of the United States for the District of Arizona, in a suit pending in said Court between Thomas P. Clark, plaintiff, and The Arizona and New Mexico Railway Company, defendant, a judgment was rendered in favor of plaintiff and against the said The Arizona and New Mexico Railway Company, for the sum of Twelve Thousand Six Hundred Seventy-five ($12,675.00) Dollars, and costs of action, and the said The [706] Arizona and New Mexico Railway Company has obtained a writ of error to reverse said judgment in the aforesaid action and filed a copy thereof in the clerk's office of said Court, and a citation directed to the said Thomas P. Clark, plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California;

Now, the condition of the above obligation is such that if the said The Arizona and New Mexico Railway Company shall prosecute its said writ of error to effect and answer all damages and costs, and if he

fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
By NORMAN CARMICHEAL,
Vice-Pres. & General Manager.

AMERICA SURETY COMPANY,
A Corporation Organized and Existing Under and by Virtue of the Laws of the State of New York and Authorized to Do Business as a Surety Company in the State of Arizona.
By W. K. JAMES,
Resident Vice-president.

[Corporate Seal]
I. J. LIPSOHN,
Resident Asst. Secy.

The above and foregoing bond approved this 24th day of February, 1913.

RICHARD E. SLOAN,
District Judge.

[707] [Endorsements]: No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Supersedeas Bond. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant,

Writ of Error (Copy).

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between Thomas P. Clark, plaintiff, and The Arizona and New Mexico Railway Company, defendant, a manifest error has happened, to the great damage of the said The Arizona and New Mexico Railway Company, defendant, as by its complaint appears, we being willing that error, if any hath, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, [708] if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California, in said Circuit, on the 24th day of March, next, in said Circuit Court

of Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 24th day of February, A. D. 1913, and of the Independence of the United States the one hundred and thirty-fifth.

Allowed:

RICHARD E. SLOAN,
U. S. District Judge.

[Seal] Attest: ALLAN B. JAYNES,
Clerk of the United States District Court for the District of Arizona.

By Frank E. McCrary,
Deputy.

Service of the within writ of error by receipt of a true copy thereof admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attorneys for Plaintiff.

[709] [Endorsements]: (38.) No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Writ of Error. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

In the District Court of the United States for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant,

Citation (Copy).

The President of the United States, to Thomas P. Clark, and to L. Kearney and W. M. Seabury, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein The Arizona and New Mexico Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the [710] judgment in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this the 24th day of February, 1913, and of the Independence of the United States the one hundred and thirty-fifth.

RICHARD E. SLOAN,
United States District Judge for the District of Arizona.

Service of the within citation, by receipt of a true copy thereof, admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attys. for Plaintiff.

[Endorsements]: (39.) No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Citation. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland and Kibbey, Bennett & Bennett, Attorneys for Defendant.

In the District Court of the United States in and for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY,

Defendant.

Praecipe for Transcript of Record.

[711] To the Clerk of the United States District Court for the State of Arizona.

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the Writ of Error to be perfected to said court in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll;
Transcript of Minute Entries;
Order Allowing Bill of Exceptions;
Bill of Exceptions;
Motion for New Trial;
Acknowledgment of Service of Bill of Exceptions;
Petition for Writ of Error;
Order Allowing Writ of Error;
Bond on Writ of Error;
Writ of Error;
Citation;
Praecipe for Transcript,—

and all other record entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United

States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. C. McFARLAND,
JOS. H. KIBBEY,
Attorneys for Defendant.

[Endorsements]: No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Praecipe for Transcript of Record. Filed Feb. 27, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. W. C. McFarland, Kibbey, Bennett & Bennett, Attorneys for Defendant.

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[712] *In the District Court of the United States in and for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant,

[Praecipe for Additions to Transcript.]

To the Clerk of the District Court of the United States for the District of Arizona.

Dear Sir:

Please include in the record on appeal in the above-entitled cause, in addition to the matters required by the plaintiff in error, the amendments pro-

posed by the defendant in error to the bill of exceptions proposed by the plaintiff in error, and oblige,

Yours respectfully,

L. KEARNEY,

By WILLIAM M. SEABURY,

Attorneys for Plaintiff.

306 Fleming Block,

Phoenix, Arizona.

[Endorsements]: No. 14. In the United States District Court. District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Plaintiff's Praecipe for Additions to Transcript. Filed Mar. 8, 1913. Allan [713] B. Jaynes, Clerk.

[Proposed Amendments to Proposed Bill of Exceptions.]

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

The plaintiff above named proposes that the defendant's proposed Bill of Exceptions served herein on December 6th, 1912, be amended as follows:

1. By requiring the defendant to strike out and omit from its proposed Bill of Exceptions all of the

evidence presented therein, except so much thereof as may be necessary to present clearly the questions of law involved in the rulings of the Court to which exceptions are reserved.

2. By requiring the defendant to set forth in condensed and narrative form so much of the evidence as may properly be embraced in said Bill of Exceptions, save as a proper understanding of the questions presented may require that parts of it be otherwise set forth.

3. By striking out the last ten (10) lines of page 332, of the Proposed Bill of Exceptions and the first five (5) lines of page 333 of such Bill upon the ground that the statement therein contained was not in fact made at the trial of said cause and that said portion of said Bill be further amended [714] by inserting therein the following:

Mr. KIBBEY.—Now, I want to get it into the record, and I would like to state it in writing just what I expect to prove.

The COURT.—Very well, that may be done.

Mr. KIBBEY.—May the record show that we offer Doctor Smith for the same purpose and that his testimony is excluded?

The COURT.—Doctor Smith?

Mr. KIBBEY.—Yes.

The COURT.—He is one of the physicians of the company?

Mr. KIBBEY.—Yes.

Mr. SEABURY.—And may it also show that if permitted to cross-examine Doctor Smith we will adduce the same testimony as already adduced?

The COURT.—With reference to his disqualification?

Mr. SEABURY.—Yes.

The COURT.—Very well.

4. By striking out all of page 348 of the proposed Bill of Exceptions except the first seven (7) lines thereof, and by striking out all of pages 349, 350, 351 of said proposed bill upon the ground that the matter which appears upon said pages presents no question for review. Upon the further ground that such statement is improper for any purpose and was presented after the close of all of the evidence, while the permission granted by the Court to the defendant allowed the [715] submission of an offer of proof provided only that said offer should be submitted before the close of the evidence. Upon further ground that to allow the defendant to make such an offer of proof at this time deprives the plaintiff of his right to establish the disqualification of the witness whose alleged evidence is thus sought to be presented to the Court, from all of which it might appear that the trial court committed error in the exclusion of such proof as was offered while no error in law was actually committed by such Court.

5. By requiring the insertion of such of the interrogatories addressed to the witness, Doctor Dietrich and the answers made thereto as were read to the Court and jury in the place of the statements on pages 311, 312, 313, 314, 315, of said Proposed Bill of Exceptions, relating thereto.

6. By striking out the last five (5) lines of page 15 of said Proposed Bill, and all of pages 16, 17, 18,

19, 20, 21, 22, 23, and 24, all of which pages appear subsequent to the charge of the Court in said Proposed Bill, upon the ground that none of the alleged errors set forth upon said pages or any of them were called to the Court's attention before the jury had agreed upon a verdict or in time to enable the Court to correct any of the alleged errors of which defendant now seeks to complain, and upon the further ground that none of the exceptions alleged to have been taken upon the delivery of the Court's charge were in fact so taken, and upon the further ground that the taking of exceptions to the Court's charge **[716]** long after the rendition of an adverse verdict is not authorized, but is expressly prohibited by the rules of practice of this court, in such case made and provided.

7. By striking out the word "protected" in the thirteenth (13) line of page 91, and inserting the word "professional" in the place thereof.

8. By striking out the words "qualification and competency" in line six of page 317, and inserting in the place thereof respectively the words "disqualification and incompetency."

9. By striking out the word "proper" in line sixteen (16) of page 325, and inserting in the place thereof the word "improper."

WHEREFORE, the plaintiff prays that each of his proposed amendments be allowed.

Dated December 16, 1912.

L. KEARNEY,
Attorney for Plaintiff.

WILLIAM M. SEABURY,
Of Counsel.

To Messrs. McFarland & Hampton, and Kibbey, Bennett & Bennett, Attorneys for Defendant.

[Endorsements]: No. 14. (33.) In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. Arizona & New Mexico Railway Company, a Corporation, Defendant. Proposed amendments to the proposed Bill of Exceptions. Original. Filed Dec. 16, 1912, at 10 A. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy. [717] L. Kearney, Attorney for Plaintiff. William M. Seabury, of Counsel.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant,

Additional Amendment to Bill of Exceptions.

Plaintiff moves, in addition to the amendments and corrections already proposed by him, that the bill of exceptions herein be amended, on page 331, follow-

ing line 10 from top thereof, by adding to the answer of witness Thomas P. Clark the following, to wit:

"I thought the examination by Dr. Stark was for the purpose of treating my eye."

Plaintiff moves the further amendment, in the testimony of witness Rebecca Manes (page A–16), following line 12 from top thereof, that the following be added:

"Clinic reports, Plaintiff's Exhibit No. 1, of her testimony was not introduced in evidence."

L. KEARNEY and
WM. M. SEABURY,
Attorneys for the Plaintiff.

[718] Service by copy admitted to have been made on us December ——, 1912.

———————————,
Attorneys for the Defendant.

[Endorsements]: No. 14. (34.) In District Court of the United States for District of Arizona. Thomas P. Clark vs. The Arizona and New Mexico Railway Company, a Corporation. Additional Amendments to Bill of Exceptions. Filed December 17, 1912. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Copy Received Dec. 17, 1912. Kibbey, Bennett & Bennett, Defendant's Attys.

[719] *In the United States District Court for the District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant.

Certificate of Clerk of U. S. District Court to Record.

United States of America,
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, numbered 1 to 718, inclusive, together with Plaintiff's Exhibits 1, 2, and 3 and Defendant's Exhibits "A" and "B," constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same, which I transmit, constitute my return to the annexed Writ of Error lodged and filed in my office on the 24th day of February, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $431.50, and that the same has been paid in full by the defendant and plaintiff in error, The Arizona and New Mexico Railway Company.

In testimony whereof, I have hereunto set my hand

and affixed the seal of said District Court at the City of Phoenix, [720] in said District of Arizona and in the Ninth Judicial Circuit, this 19th day of March, A. D. 1913, and the Independence of the United States of America, the one hundred and thirty-seventh.

[Seal] ALLAN B. JAYNES,
Clerk of the United States District Court for the District of Arizona.

[Endorsed]: No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. The Arizona and New Mexico Railway Company, a Corporation, Plaintiff in Error, vs. Thomas P. Clark, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received March 24, 1913.

F. D. MONCKTON,
Clerk.

Filed March 24, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Writ of Error (Original).]

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant.

The President of the United States, to the Honorable Judge of the United States District Court for the District of Arizona, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between Thomas P. Clark, plaintiff, and The Arizona and New Mexico Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Arizona and New Mexico Railway Company, defendant, as by its complaint appears, we being willing that error, if any hath, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit, on the 24th day of March next, in said Circuit Court of

Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this, the 24th day of February, A. D. 1913, and of the Independence of the United States the one hundred and thirty-fifth.

Allowed:

RICHARD E. SLOAN,
U. S. District Judge.

[Seal] Attest: ALLAN B. JAYNES,
Clerk of the United States District Court for the District of Arizona.

By Frank E. McCrary,
Deputy.

Service of the within writ of error by receipt of a true copy thereof admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attorney for Plaintiff.

[Endorsed]: No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Writ of Error. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error. Received Mar. 24, 1913. F. D. Monckton, Clerk. Filed Mar. 24, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Citation on Writ of Error (Original).]

In the District Court of the United States for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Defendant.

The President of the United States, to Thomas P. Clark, and to L. Kearney and W. M. Seabury, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein The Arizona and New Mexico Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error men-

tioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this the 24th day of February, 1913, and of the Independence of the United States the one hundred and thirty-fifth.

RICHARD E. SLOAN,
United States District Judge for the District of Arizona.

Service of the within Citation, by receipt of a true copy thereof, admitted this 24th day of February, 1913.

L. KEARNEY,
By W. M. SEABURY,
Attys. for Plaintiff.

[Endorsed]: No. 14. In the District Court of the United States in and for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, Defendant. Citation. Filed Feb. 24, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Writ of Error. Received Mar. 24, 1913. F. D. Monckton, Clerk. Filed Mar. 24, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

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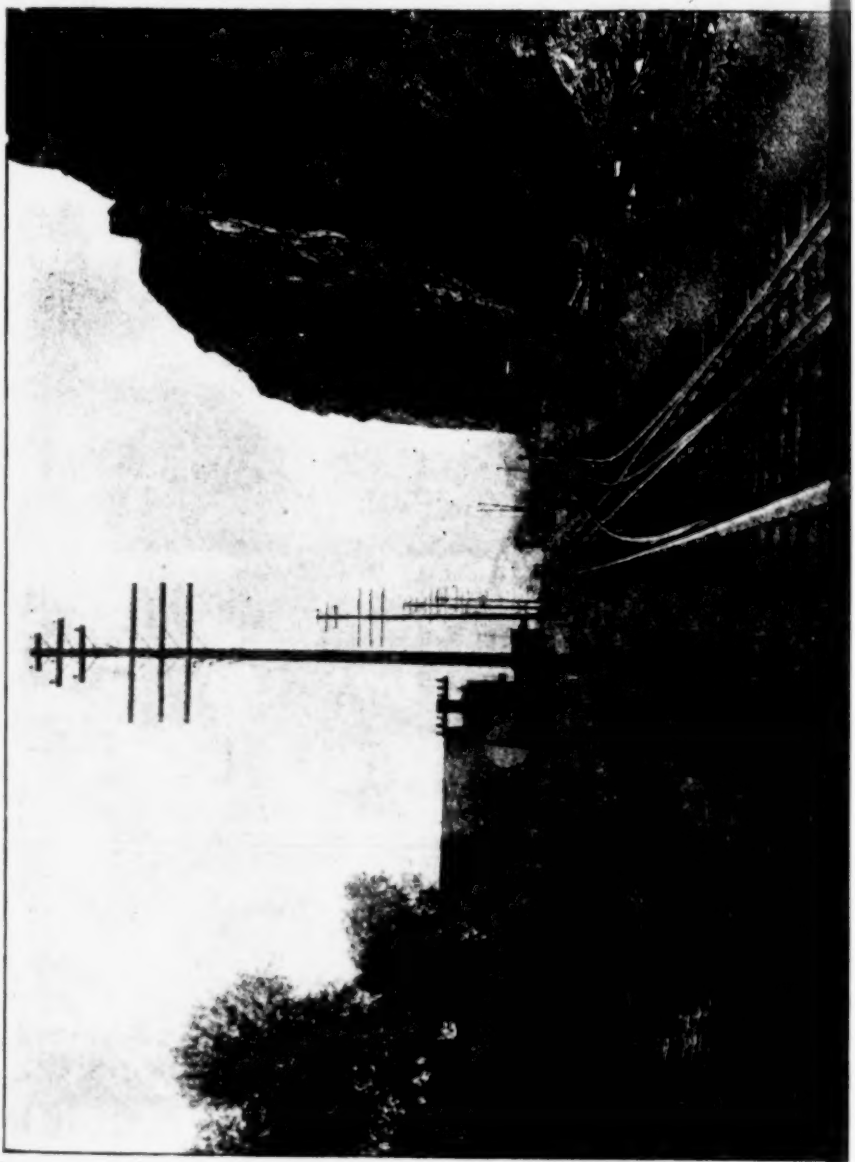
Defendant's Exhibit "B" (Plan Showing Arizona and New Mexico Tracks in Vicinity of Switch to Shannon Hill)	705

(Here follow photographs and diagrams, marked pages 699-706.)

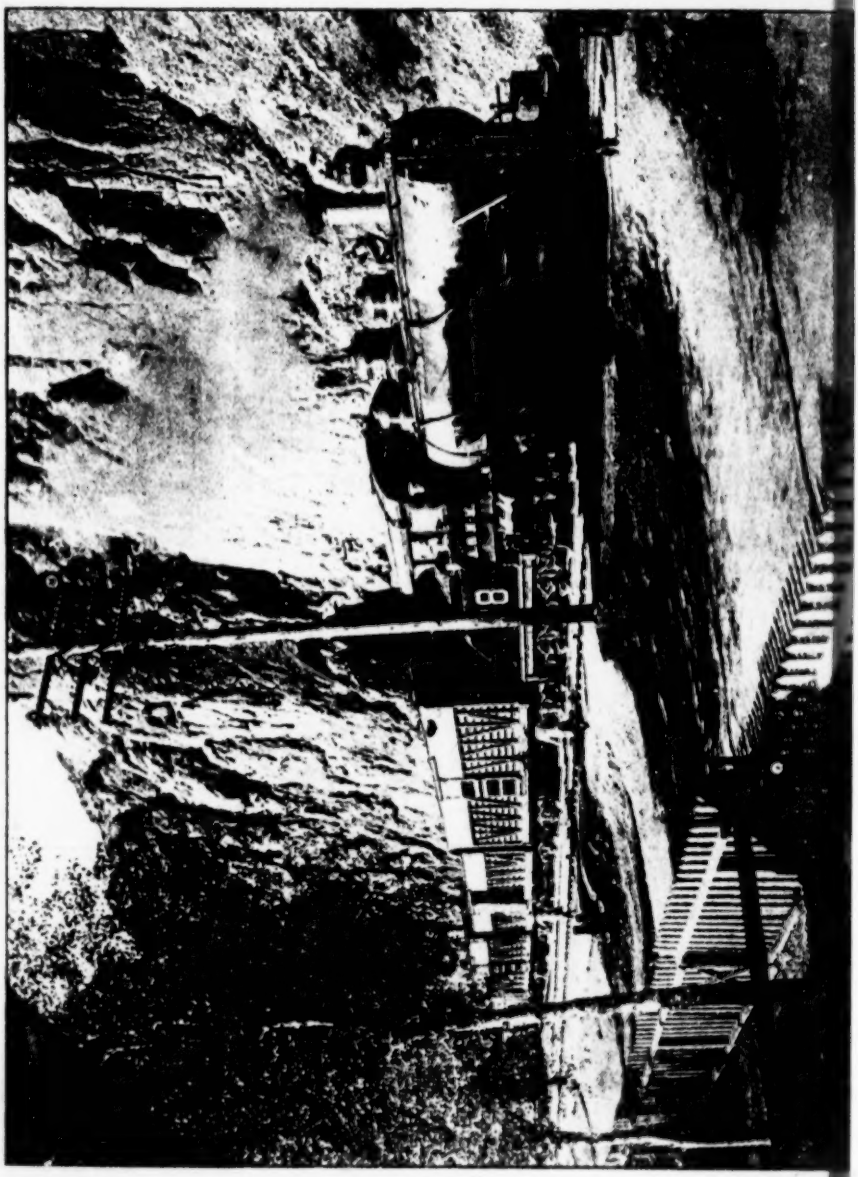
Plaintiff's Exhibit No. 1.



[Endorsed:] Plffs. Ex. 1. F. E. M. # 14. Thos. P. Clark vs. Ariz. & N. M. Ry. Co. Filed Nov. 12, 1912. Allan B. Jaynes, Clerk, by Frank E. McCrary, Dep.

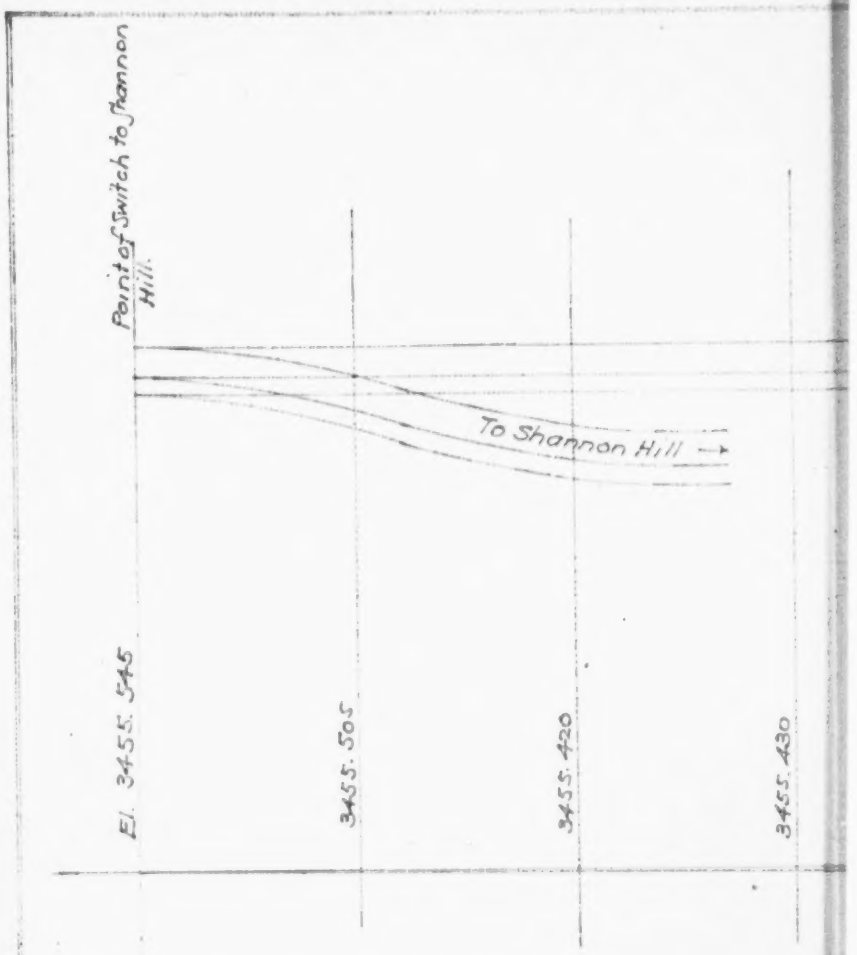
No. 2259. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 1. Received Mar. 24, 1913. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 2.

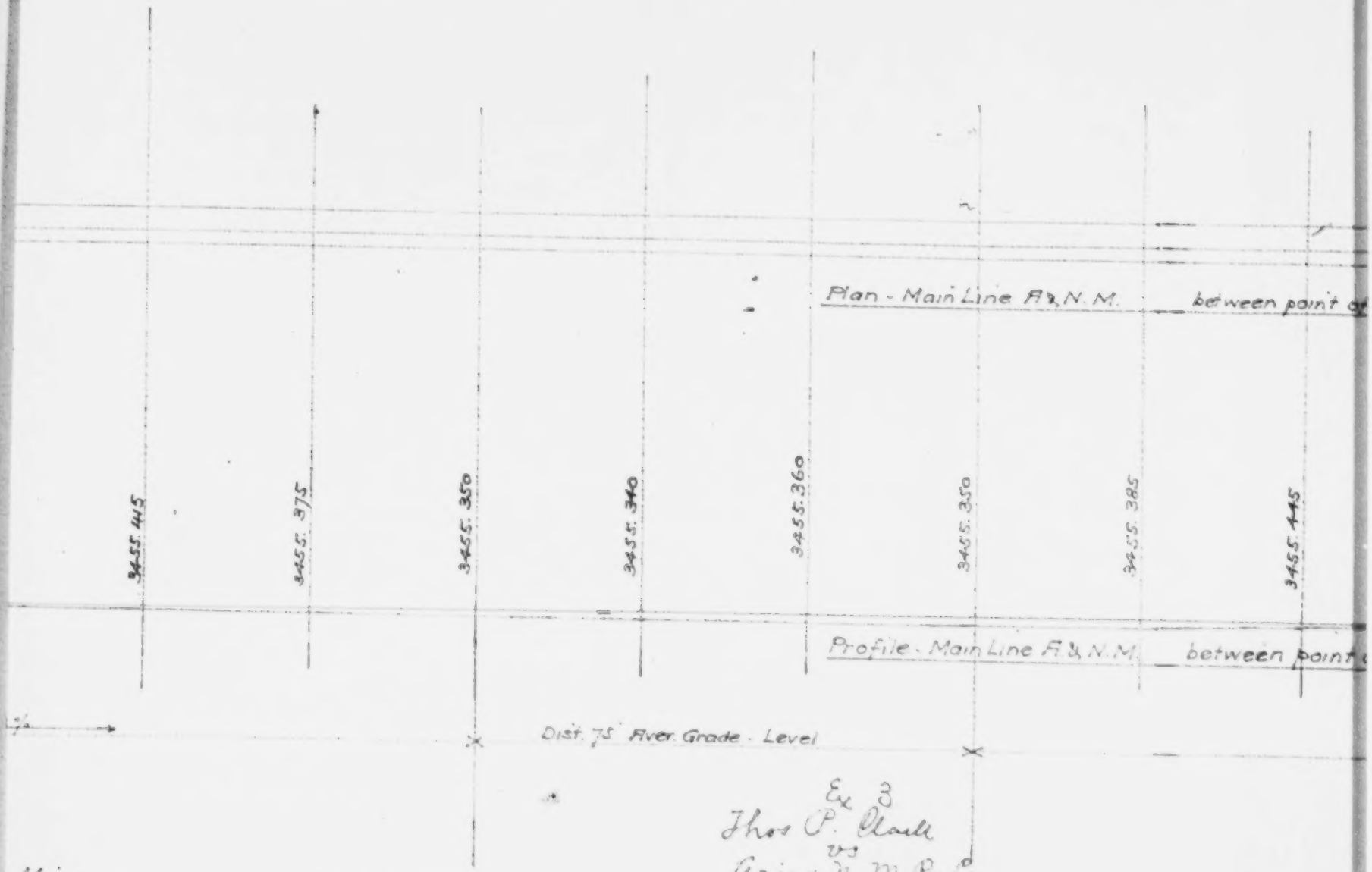


[Endorsed:] Plff. Ex. 2. F. E. M. # 14. Thos. P. Clark vs. Ariz. & N. M. Ry. Co. Filed Nov. 12, 1912. Allan B. Jaynes, Clerk, by Frank E. McCrary, Dep.

No. 2259. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 2. Received Mar. 24, 1913. F. D. Monckton, Clerk.



No. 14
Plaintiff Exhibit No 2
Jas. F. Kerby
Notary Pu
Filed May- 13/1913.
Allan B Jaynes Clerk
By W E Boggs Deputy Cl
U.S. Dist



Ex 3
Thos P. Clark
vs
Ariz & N. M. Ry. Co.
Filed Nov. 12/12
Allan B. Gaynes
Clerk
By Frank E. McGann
Dep.

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Case No. 2259.
U.S. CIRCUIT COURT OF APPEALS.
FOR THE NINTH CIRCUIT
PLAINTIFFS EXHIBIT No. 2.
Received MAR. 24 1913.
F. D. MONCKTON, Clerk.

rst Court
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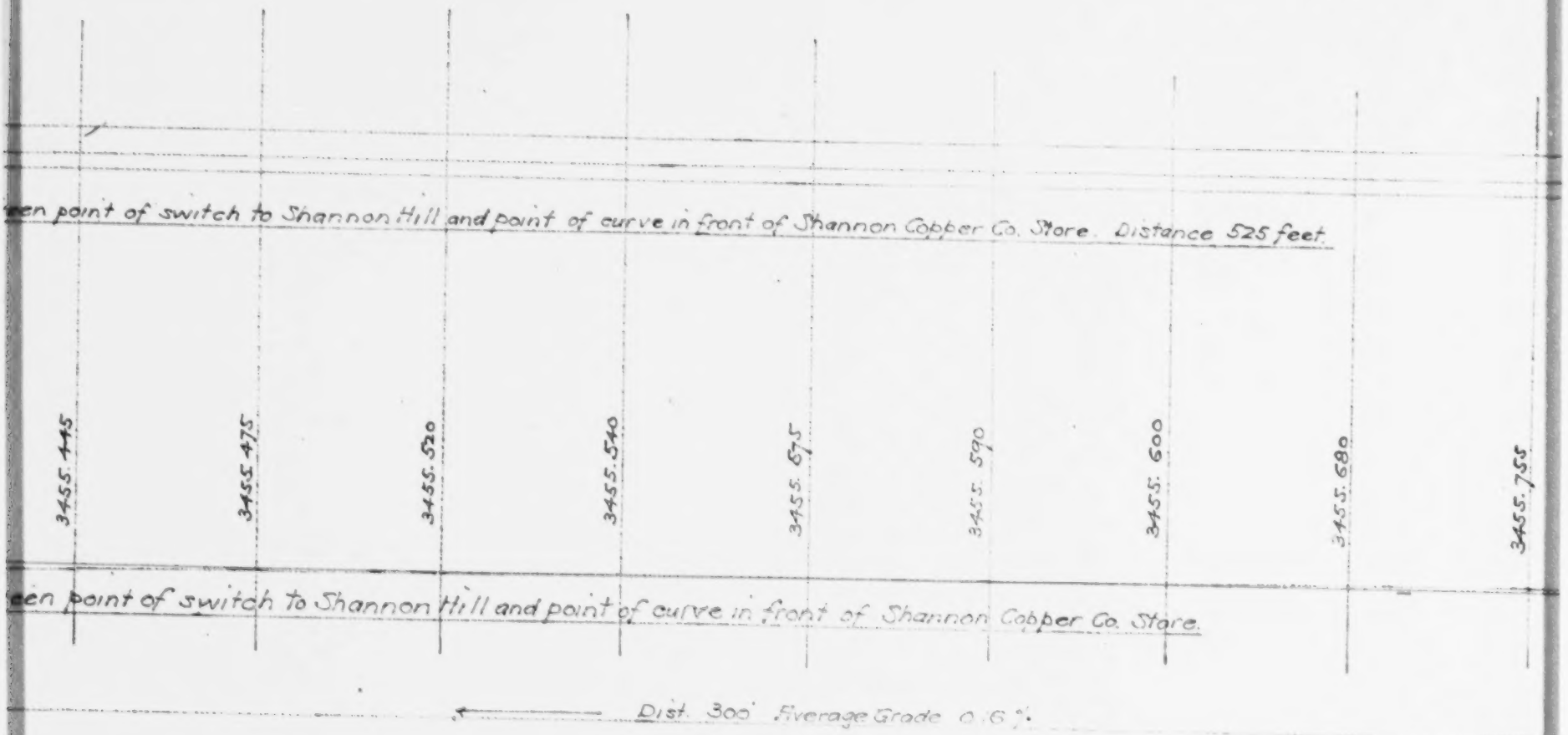
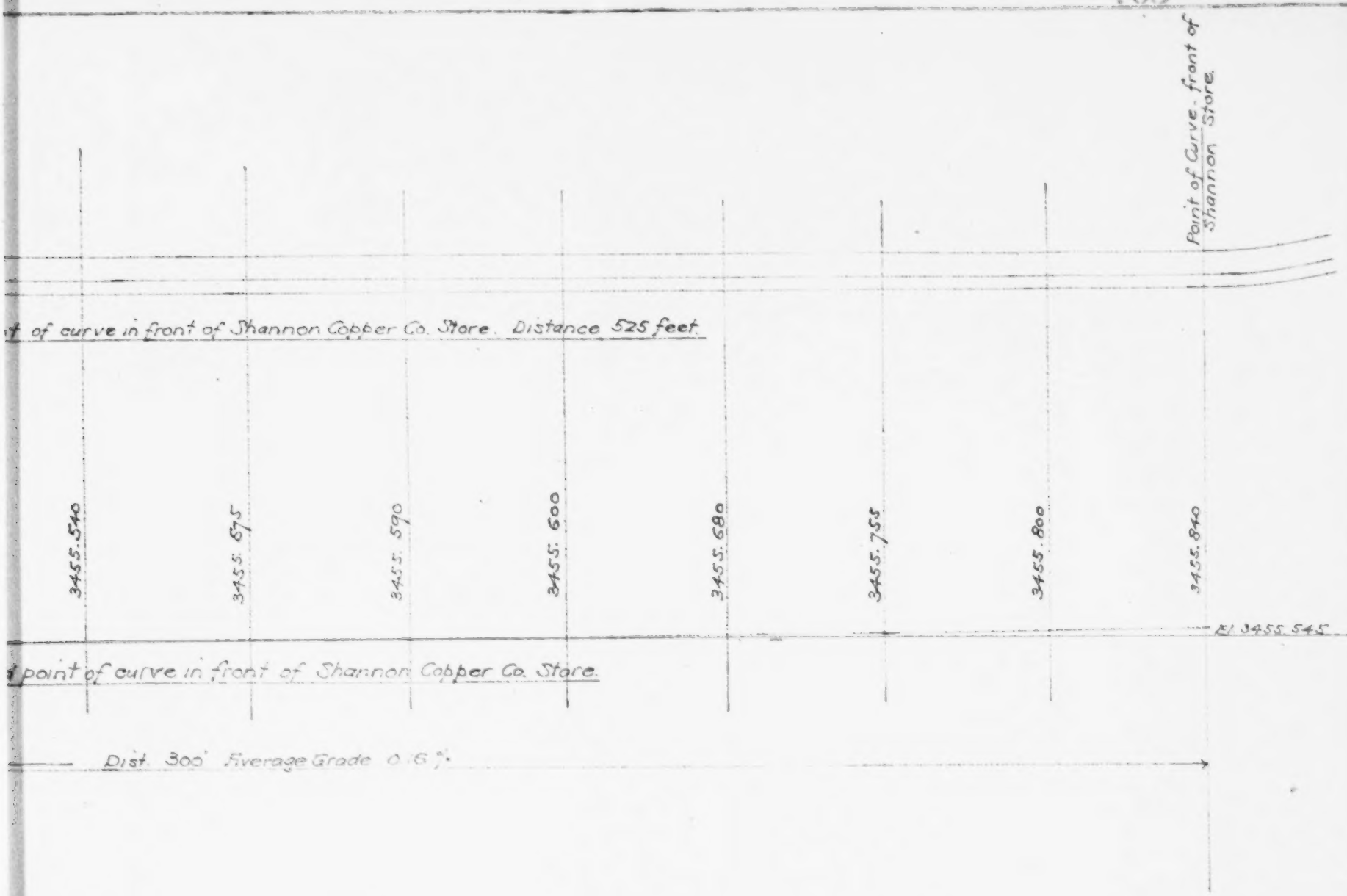
Note :- Elevat
Black line


een point of switch to Shannon Hill and point of curve in front of Shannon Copper Co. Store. Distance 525 feet
3455.445
3455.475
3455.520
3455.540
3455.575
3455.590
3455.600
3455.680
3455.755
een point of switch to Shannon Hill and point of curve in front of Shannon Copper Co. Store.
Dist. 300' Average Grade 0.6%

e:- Elevations from U.S.G.S. Bench Mark.
Black line of Profile indicates top of rail.

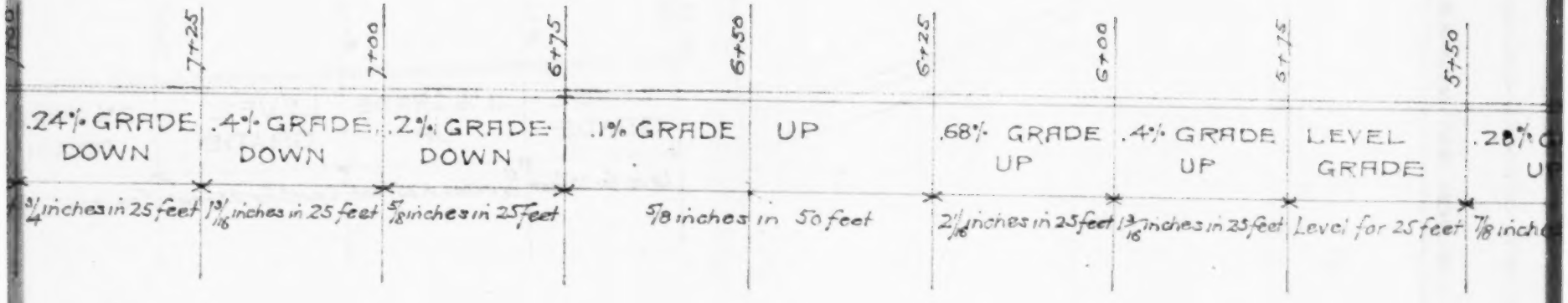
Scale : { Horizontal - 1" = 20'
Vertical - 1/4" = 1'



Scale : { Horizontal - 1" = 20'
Vertical - 1/4" = 1'

Clifton. Ariz. April - 9 - 1912.

8+46.6 Center of First Poisson of San Francisco River R.R. Bridge = Station 8+46.6
8+25
8+00
7+75
7+50
LEVEL GRADE
.1% GRADE UP
LEVEL GRADE
.2% GRADE DOWN
.2
Level for 25 feet
5/16 inches in 25 feet
Level for 25 feet
5/8 inches in 25 feet
3/4



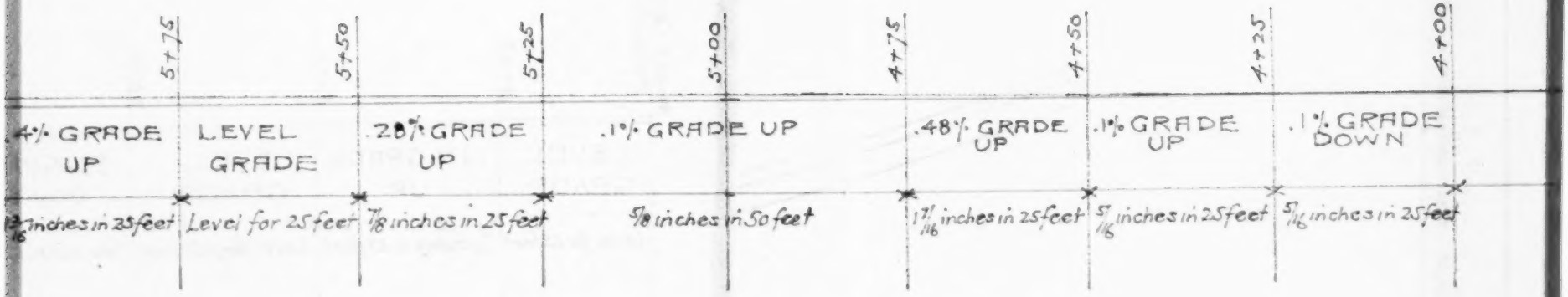
Left to Exhibit
for identifica

PROFILE OF A&NN

FROM SHANNON SWIT

TO S.F. RIVER

SOUTH CLIF



ALL READINGS TAKE

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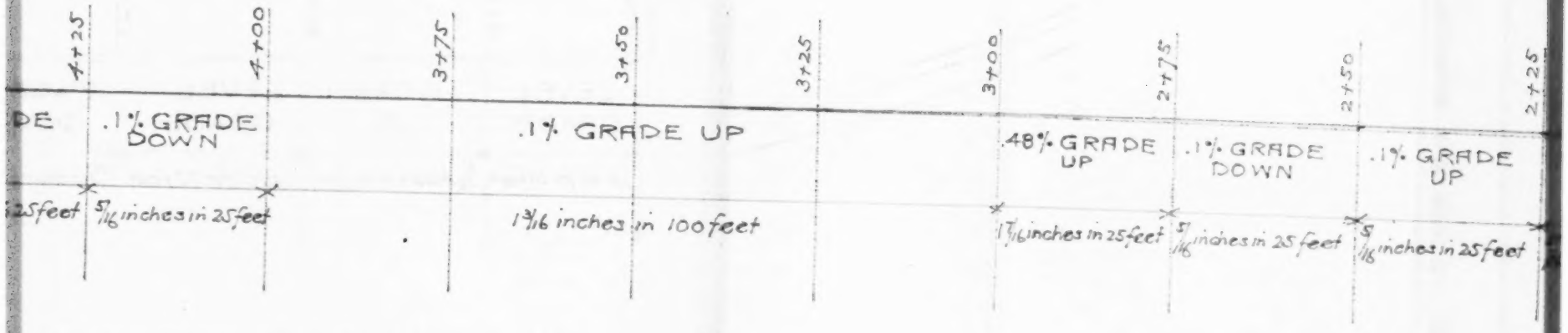
for identification

FILE OF A&NM TRACK

SHANNON SWITCH. POINT - TO S.F. RIVER BRIDGE. SOUTH CLIFTON



ALL READINGS TAKEN IN DIRECTION OF ARROW.

SCALE : 1" = 10'-0"
< Reduced to 1" = 20'-0" >

Case No. 2259
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
DEFENDANT'S EXHIBIT "A"
Received. MAR. 24. 1913.
F. D. MONCKTON. Clerk.

Defendants Exhibit "A"
Filed November 14. 1912.
Allan B. Haynes, Clerk
By Francis D. Crable, Deputy.

3680. P.H. 61.

#11

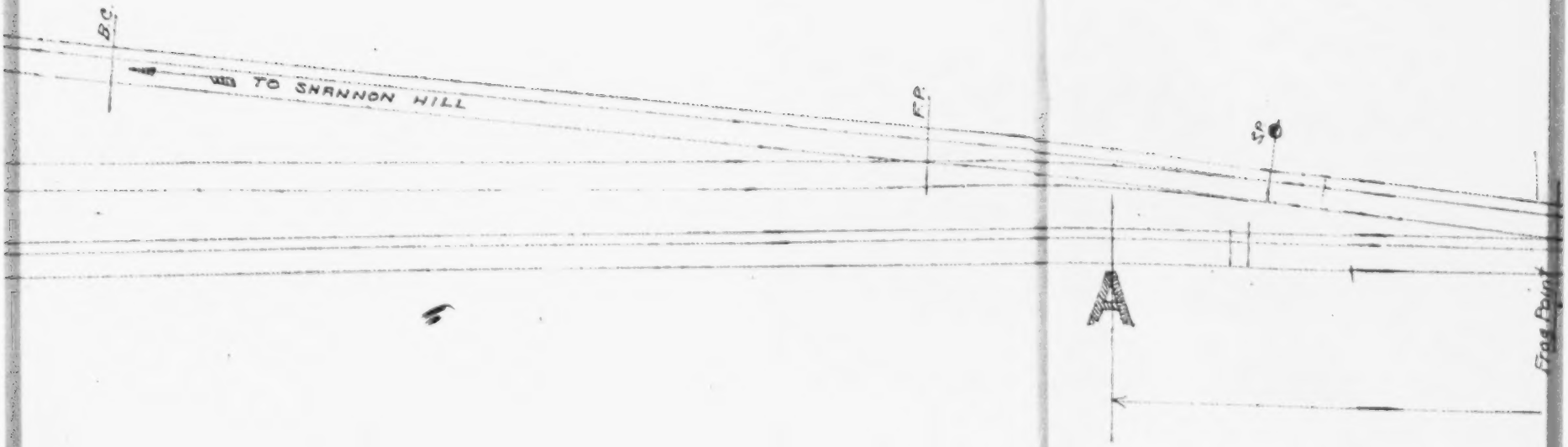
Filed Defendant's
Nov 10-1912
allan B.
By Francis C.

"B"

Clerk
Deputy. "B"

CASE No. 2259.
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
DEFENDANT'S EXHIBIT 'B'
Received MAR. 24 1913
F. D. MONCKTON, Clerk.

IN

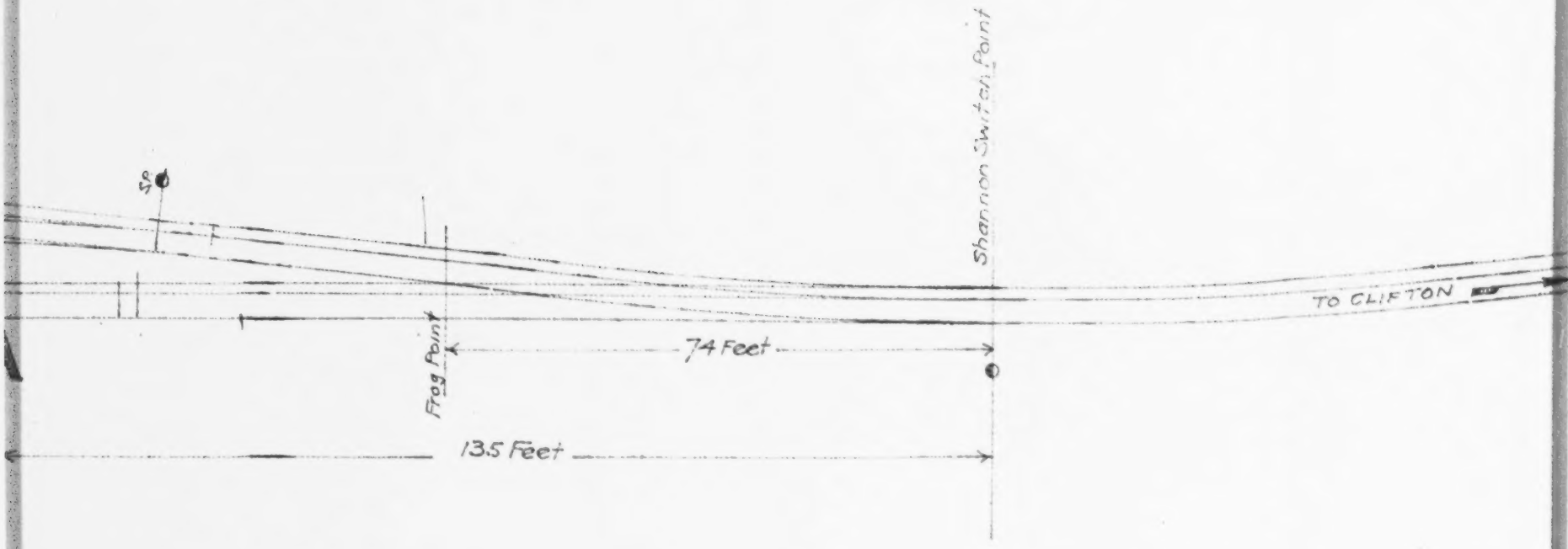


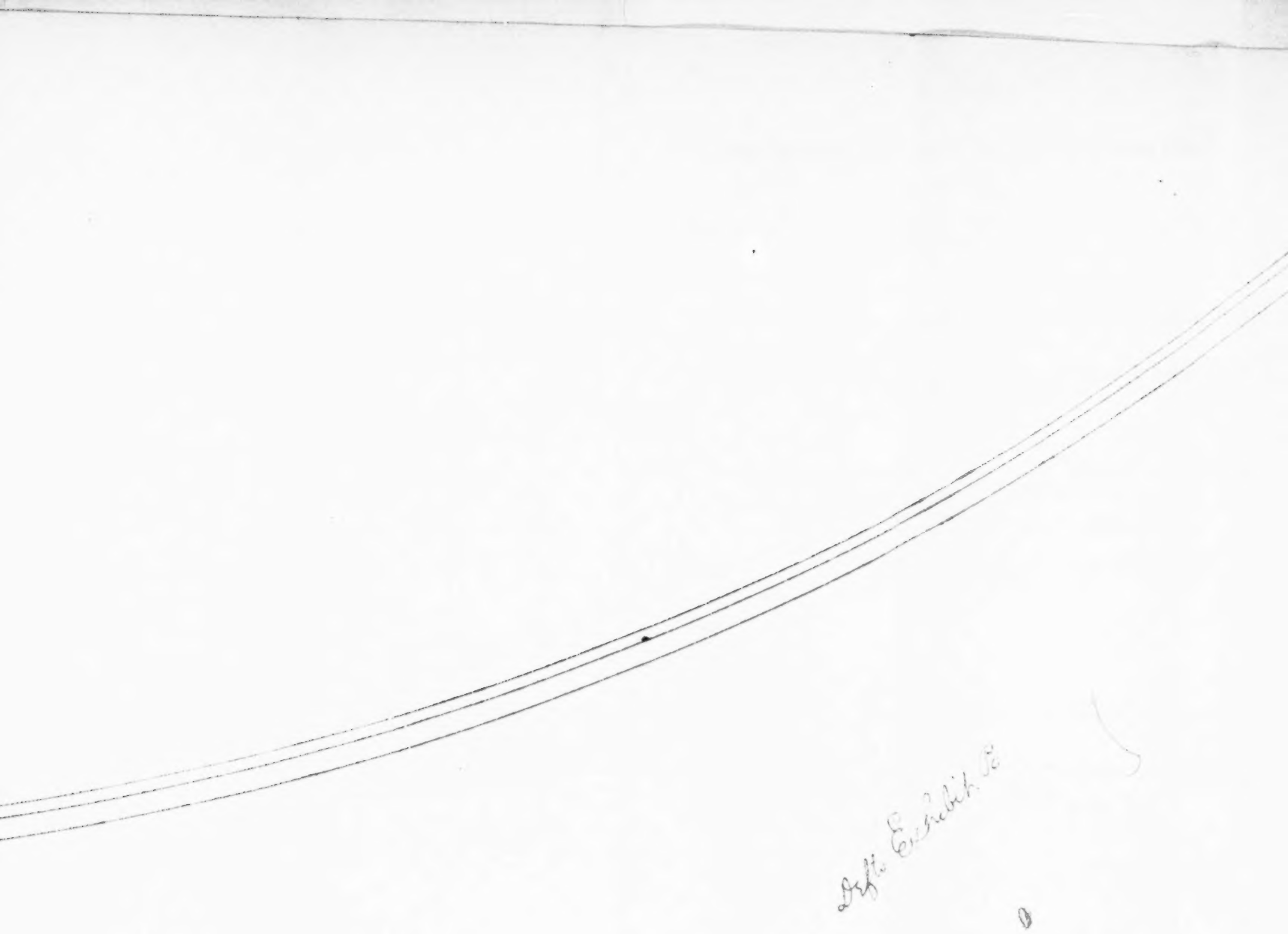
PLAN SHOWING A&NM TRACKS

IN VICINITY OF SWITCH TO SHANNON HILL,

CLIFTON, ARIZONA.

SCALE 1"=10'-0"
<Reduced to 1"=200'>.




Dr. Elisabeth Sc.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

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United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Sixth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Thirteen:

Present:

The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William H. Hunt, Circuit Judge.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. W. C. McFarland, counsel for the plaintiff in error, and by Mr. William M. Seabury, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file a supplemental brief within two (2) weeks from date, the same to be duly served upon counsel for the defendant in error within the time stated.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court for the District of Arizona.

Before Gilbert, Ross, and Hunt, Circuit Judges.

Ross, *Circuit Judge:*

The complaint in this action, which is for damages for personal injuries alleged to have been received by the plaintiff below, defendin error here, through the alleged negligence of the defendant to the

action, was twice amended, the sufficiency of that upon which the case was tried being questioned by two demurrers, one general and the other special, and by two motions, in support of each of which are cited in the brief here filed for the plaintiff in error a large number of authorities. It is readily conceded that the complaint might well have been more concise, logical, and clear, but we are of the opinion that its manifest defects are not fatal.

In addition to the jurisdictional facts it alleges, in effect, that at the times in question the defendant to the action was the owner of and engaged in operating a railroad from Clifton, Arizona, to Hachita, New Mexico, (then territories but since become states,) carrying both passengers and freight for hire over its road between the points mentioned; that at Clifton it owned and maintained as a part of its road a large number of tracks, turn-outs, and switches, for the storage of cars and for the making up of trains, which tracks and switches extended from the company's depot in Clifton southerly about a quarter of a mile to where the company's bridge crosses the San Francisco River; that about 800 feet north of the bridge one of the company's switches left its main track and extended a distance of about one-half mile to the smelter of the Shannon Copper Company, the grade of which switch is so steep that the engine upon which the plaintiff was engineer could haul only four of the company's cars at any one trip; that the company's main line from the bridge to the smelter switch is down-grade to such an extent that cars placed thereon without brakes set or without being well chocked would not remain still but would run to and past the switch; that at the time of the accident in question, to-wit, March 15, 1911, the company had in its yards at Clifton 12 freight cars brought from without the then territory of Arizona over its road, which were loaded with coke and merchandise and consigned to the Shannon Copper Company; that the plaintiff was then engaged as engineer of the company's switch engine used by it in moving such interstate commerce; that in moving the 12 freight cars mentioned the company furnished the plaintiff with a crew of helpers consisting of a fireman, the yard-master, the foreman, and two brakemen, and that when the plaintiff and the said crew began the removal of the 12 cars eight of them were brought down the main track to a point about 450 feet north of the bridge and 200 feet south of the smelter switch, where four of the cars were uncoupled and left on the main track, and four of them were coupled to the switch engine; that when the four cars were uncoupled and left at the point about 200 feet south of the switch it became and was the duty of the three helpers left in charge of them to set the brakes thereon and securely chock and fasten them so that they would not run down the track to the point where the plaintiff was engaged in hauling the other four of the cars on to the switch, which duties the said helpers wholly failed to perform, on account of which negligence the four cars so left standing began to move and run down the track towards the switch which the plaintiff was entering with his engine and the four cars attached thereto, when the said foreman and one of the brakemen carelessly and wrongfully signalled the plaintiff to stop

his engine, which he did within eight seconds, resulting in the tender of the engine cab in which the plaintiff was at the time sitting being struck with great force by the four cars that had been left on the main track, resulting in the loss of one of the plaintiff's eyes and other serious bodily injuries to him. The complaint also alleged that the company's road-bed was defective and unsafe, that the brakes on the said cars and their coupling apparatus were out of repair and unsafe, that there were not enough brakemen furnished by the company to manage the cars, of all of which the company was well aware, and that the cars were negligently and carelessly managed and operated, and that the negligence alleged was the direct and proximate cause of the plaintiff's injury.

In its answer the defendant put in issue all the allegations in respect to its negligence, and alleged that the plaintiff's injuries were caused by his own negligence and want of care, and also set up that the injuries received by him were the result wholly of the ordinary risks of his employment, which risks were known to him or would have been known to him by the use of ordinary care.

At the trial, upon the conclusion of the plaintiff's evidence, the defendant moved the court for a directed verdict in its favor, the denial of which motion constitutes one of the assignments of error. A conclusive answer to the point is that the defendant proceeded to introduce testimony in its own behalf upon the issues in the case and did not renew the motion upon the conclusion of all of the evidence. Sigafus v. Porter, 179 U. S. 121; The Columbia, etc. v. Hawthorne, 144 U. S. 202; Roberts v. Perkins, 129 U.S. 233; Grand Trunk Railway v. Oliver, 106 U. S. 700; American Smelting Company v. Karapa, 173 Fed. 607, and cases there cited.

The ruling of the trial court refusing to permit the defendant to introduce the testimony of two witnesses—Kelly and Kline—is also assigned as error.

In respect to Kelly the record shows that the defendant asked the witness whether the plaintiff was a careful or negligent man in the operation of his engine in switching cars, and whether he knew of any instances prior to the accident and within the space of two years where he was negligent in the operation of his engine in respect to obeying signals, and offered to show by the witness that the plaintiff for two years previous to the accident in question "was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant"; and of the witness Kline the defendant asked the question: "Do you know his (plaintiff's) general reputation as to being a safe and conservative engineer, or as to his reputation of being a reckless engineer in the operation of his engine"—objections to all of which the court sustained, to which rulings the defendant excepted.

We think the rulings right. So far as concerns the signals, the evidence showed that the plaintiff strictly obeyed the signal given him in the instance in question by stopping his engine within eight seconds after receiving it, resulting in the injuries complained of; and we find nothing in the evidence to the contrary. Whether he failed to obey some other signal at some other time was manifestly immaterial.

In 29 Cyc. 619, it is said:

"By the weight of authority evidence of plaintiff's habits and usual conduct as to a particular act, or of his character for prudence or recklessness, is not admissible on the question of contributory negligence"—citing numerous cases. See, also, id. 610.

In 21 Am. & Eng. Encyc. of Law, 2d Ed., 518, it is said:

"It is a general rule that in an action for negligence evidence is not admisible of other independent and disconnected acts of negligence as going to show negligence in the case at bar. It is fundamental, indeed, that evidence of any alleged negligent act or omission which could not by any possibility have contributed to the plaintiff's injuries should not be received. But where, though an act or omission may in a sense be collateral, yet from it an inference of fact may be drawn bearing upon the particular act or omission alleged to be negligent, and from which the injuries resulted, evidence thereof is not incompetent. And so where the injuries complained of resulted from the combined or concurrent effect of the acts of several parties, evidence of the negligent act of each, performed independently of the others, is admissible." See, also, Missouri K. & T. Railway Co. v. Johnson, 48 S. W. Rep. 568; Thompson on Negligence, Vol. 6, Sec. 7792.

The refusal of the court below to admit in evidence the deposition of the plaintiff's physician—Dr. Dietrich—is assigned as error. That deposition, while printed in the transcript, is not included in the bill of exceptions, or in any way made a part of the record of the case, and is not, therefore, for our consideration. In Russell v. Ely, 2 Black, 575, 580, the Supreme Court said:

"What purports to be the entire deposition of Baker is sent up by the clerk of the District Court, and is printed in the record before us, and if properly before us might sustain the exception; but this deposition is not incorporated in the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless incumbrance of the transcript and an expense to the litigating parties."

That case was cited with approval by the same court in United States v. Copper Queen Mining Company, 185 U. S. 495, 498. See, also, Alaska Commercial Company v. Dinkelspiel, 126 Fed. 164; Boatmen's Bank v. Trower Bros. Co., 181 Fed. 809; Star Co. v. Madden, 188 Fed. 910.

The defendant company also sought to introduce the testimony of Dr. Stark, an oculist, who was called to examine the plaintiff's eyes, and upon objections of counsel for the latter the court excluded his testimony upon the ground that such examination and the attending communications between the physician and patient were privileged; to which ruling the defendant excepted and here assigns it as error.

A statute of Arizona provides:

"A physician or surgeon cannot be examined without the consent of his patient as to any communication made by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of such patient: Provided,

that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

Such statutes are designed to protect the patient, and should be liberally construed to that end. Underhill on Crim. Evid., 2d Ed. Sec. 179, p. 341; 23 Am. & Eng. Encyc. of Law, 2d Ed., pp. 83, 84, 85, and numerous cases there cited.

It is contended on behalf of the plaintiff in error that "Dr. Stark was employed and paid by the defendant company for the purpose of being advised of the condition of the patient's eye at the date of examination"; and such appears from the evidence to have been the fact. But the trial court found that the plaintiff did not know the real purpose of the calling in of Dr. Stark, but believed that the latter's services were engaged for his, plaintiff's benefit, and as his physician in connection with Dr. Dietrich. The record contains a large amount of testimony on that point which is more or less conflicting—there being some inconsistency in the testimony of the plaintiff himself, as will be seen from this excerpt:

"Q. Tell us what the hospital was where you were examined.

"A. They call it the A. C. Hospital.

"Q. Is that, or is it not, the hospital in which injured employees of the defendant are examined?

"A. Yes, sir.

"Q. Did you know that to be the fact at the time of your examination?

"A. Yes, sir.

"Q. Who was it that requested you to be examined, if anyone, by Dr. Stark?

"A. I think it was Dr. Dietrich.

"Q. You think Dr. Dietrich suggested it?

"A. Yes, sir. He told me when he would be there.

"Q. Was anything said to you with reference to the purpose for which that examination was requested or required?

"A. To examine my eye.

"Q. Dr. Dietrich was then in attendance upon you as your physician?

"A. I was still under his charge.

"Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company or for your benefit?

"A. I don't know.

"Q. You don't know for whose benefit it was to be made?

"A. For my benefit, I suppose.

"Q. Is that what you understood?

"A. Yes.

"Q. Did you or did you not believe that Dr. Stark was in consultation with Dr. Dietrich your attending physician?

"A. Yes, sir.

"Mr. KIBBEY: You are leading him right along.

"The COURT: I think the communication is privileged—I will sustain the objection.

"(By Mr. KIBBEY):

"Q. You say Dr. Dietrich was there?
"A. He might have been in and out.
"Q. As a matter of fact, he wasn't in town, was he?
"A. Yes, sir, I think so.
"Q. You had a conversation with Dr. Stark, didn't you?
"A. Yes, sir.
"Q. In the course of that conversation did you state to Mr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

"Mr. SEABURY: We object to the question.
"The COURT: I sustain the objection.

"(By Mr. KIBBEY):

"Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

"Mr. SEABURY: We make the same objection.
"The COURT: Same ruling.

"(By Mr. KIBBEY):

"Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work or anything of that kind?

"Mr. SEABURY: We object.
"The COURT: Is this a general examination—isn't it as to this matter of the competency of this doctor?
"Mr. KIBBEY: I am trying to get to the matter of the competency of this doctor.
"Mr. SEABURY: The question is did you have any talk with the company. I don't see what——
"The COURT: You may answer.

"The WITNESS: No, sir.

"(By Mr. KIBBEY:)

"Q. You had not had any talk with any of them up to that time?
"A. No, sir.
"Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye?
"A. I told Dr. Dietrich about it and he made the appointment with the doctor, I suppose.
"Q. Didn't Dr. Dietrich tell you the company wanted an examination made for their information as to your condition and didn't you so understand it?

"Mr. KEARNEY: We object to that as a privileged communication.
"The COURT: I overrule the objection.

"The WITNESS: I told Dr. Dietrich about it and he tried to ex-

amine it himself, and then he made the date with Dr. Stark a few days afterwards.

"Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?

"A. I supposed that was the object—very likely.

"Q. You understood when the examination was made that it was for the purpose of getting information for the company?

"A. Yes.

"Mr. KIBBEY: Now, we think it is competent.

"The COURT: That answer is contradictory to the other.

"Mr. SEABURY: Absolutely, your Honor.

"Mr. KIBBEY: Yes, it is.

"Mr. SEABURY: However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness' testimony both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.

"Mr. KIBBEY: I think it is quite obvious to the contrary.

"Mr. SEABURY: We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know——

"The COURT: I will put a question.

"(To the witness:)

"Q. What did you understand was the object of this examination of your eyes?

"A. To know whether it was injured or not.

"Q. What difference did it make whether it was injured or not in your judgment?

"A. It would make a whole lot.

"Q. In what way?

"A. From good sight to blindness—I wanted that information.

"Q. Who wanted it?

"A. I did.

"Q. You wanted it?

"A. I wanted to know the condition of it. When I reported to Dr. Dietrich he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared there.

"Mr. SEABURY: We think that makes it too clear, your Honor.

"The COURT: I think so."

The real purpose, as practically conceded by counsel for the plaintiff in error, of Dr. Stark's examination of the plaintiff being to obtain information to be used against any claim on his part for damages, good faith required that the plaintiff should have been frankly told that Dr. Stark came as the representative of the company, and not left to infer that he came as his own physician, as he very well might from the statement of Dr. Dietrich, according to the plaintiff's testimony, that he needed an oculist to consult

with. Munz v. Salt Lake Railway Company, 70 Pac. Rep. 852; 1 Elliott on Evidence, Sec. 634, p. 741; Underhill on Crim. Evid., 2d Ed., Sec. 179; see, also, Union Pacific R. R. Co. v. Thomas, 152 Fed. 365, and cases there cited.

We therefore think the court below was right in excluding the testimony of the witness in question.

There are various assignments of error in respect to giving and refusal to give certain instructions to the jury which we are precluded from considering for the reason that exceptions thereto were not seasonably taken. The record shows that after the jury had been instructed and retired in charge of the bailiffs, certain exceptions were taken by counsel for the respective parties, and the record shows that "before the jury retired to consider of their verdict that the court granted permission to the defendant to embody in its bill of exceptions, if it should tender one, its objections to the instructions of the court to the jury more at length and in detail."

That none of such exceptions can be here considered was distinctly decided by this court in the case of Western Union Tel. Co. v. Baker, 85 Fed. 690, and has been so held by many other federal courts. See the numerous cases cited in that last mentioned, and in Star Company v. Madden, 188 Fed. 910, where is set out the rule laid down by the Supreme Court in Phelps v. Mayer, 15 How. 161, as follows:

"It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster II, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and, if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice."

There remains to consider only the objections to the amount of the judgment. The plaintiff in error contends that the judgment of the court below is erroneous in that by it the plaintiff is allowed interest on the amount of the verdict from the date of the judgment, and cites in support of the point the decision of the court of appeals of the Fifth Circuit in the case of White, et al. v. United States, 202 Fed. 501, which decision does not at all support the contention. That was an action for damages for the cutting and conversion of timber from the lands of the Government, and in which the jury by its verdict allowed interest from the date of the conversion to the date of the trial of the case—a period of 13 years. The court of appeals, in disposing of the case, said:

"The oral charge of the court is set out in the bill of exceptions in its entirety, and contains no reference to the question of interest.

Interest in actions of tort in the federal courts is not allowable as a matter of right; but its allowance, as part of plaintiff's damages, is discretionary with the jury. Eddy v. Lafayette, 163 U. S. 458-467, 16 Sup. Ct. 1082, 41 L. Ed. 225.

"The jury were not instructed by the court below that they possessed any such discretion, and probably included interest in their verdict upon the idea that the plaintiff was entitled to it as a matter of right, and not of discretion.

"It is true the plaintiffs in error do not assign error because of this omission of the court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest."

The case of Eddy v. Lafayette, 163 U. S., there cited, is, however, authority for the approval of the judgment of the court below in the present case in allowing interest from the date of the judgment. See pages 461-467 of 163 U. S.

Under the well-established rule prevailing in the federal courts the question of the amount of damages awarded the plaintiff is not for our consideration. Texas & Pacific Railway Co. v. Behymer, 189 U. S. 469; Western Gas Construction Co. v. Danner, 97 Fed. 883, 890.

The statute of Arizona entitled "An Act securing compensation for injuries to workmen and their dependents received while engaged in dangerous and hazardous service, and providing remedies therefor," approved June 8, 1912, Session Laws of Arizona, 1912, page 23 (Special Session), and relied upon by counsel for the plaintiff in error, having been passed long subsequent to plaintiff's injuries, has no application to the case.

It results from what has been said that the judgment of the court below must be, and it is, accordingly,

Affirmed.

[Endorsed:] Opinion, U. S. Circuit Court of Appeals. Filed September 8, 1913, (Signed) Frank D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Judgment, U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the District of Arizona.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed:] Judgment, U. S. Circuit Court of Appeals. Filed and Entered September 8, 1913, (Signed) F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Petition for Rehearing.

W. C. McFarland, Attorney for Plaintiff in Error.

Filed Oct. 7, 1913. Frank D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error in the above entitled cause, and most respectfully petitions this Honorable Court to grant it a rehearing on the following grounds, to-wit:

I.

First. Because said complaint, nor either count thereof, states facts sufficient to constitute a cause of action. The rule contended for by plaintiff in error in this case is, that a servant entering into the employment of the master, expressly or impliedly assumes the open and obvious risks and dangers incident to the occupation, and also those risks and dangers which are known or are so plainly observable that the employee may be presumed to know them.

Schlemmer vs. Buffalo R. & P. Ry., 220 U. S. 590.

The direct and proximate cause of the injury alleged in the amended complaint is the failure of the defendant to chock or set brakes on the freight cars left standing on the main line of the defendant's railway. This operation by defendant was open, and obviously incident to the occupation in which plaintiff was engaged, and hence assumed by him, if the operation was not open and obvious the risks and dangers of such operation is assumed by plaintiff unless he did not know or could not have known by the use of ordinary care, of such risks and dangers. The master violates no duty to the servant my failing to protect him from risks and dangers that are open and obvious nor from those risks and dangers which he knows or that are so apparent that he is presumed to know them. To allege a cause of action constituting actionable negligence, some breach of duty must be stated resulting in injury to the servant. It is a familiar principle that negligence is the result of breach of duty. If there has been no breach of duty, there can be no negligence. We respectfully submit that this is the common law rule on assumption of risks and applicable to this cause, unless changed or modified by the provision of the Federal Employer's Liability Act. We most respectfully contend that the common law rule remains under this statute with the single exception that it does not apply in cases where the injury results from the violation by the master of some statute enacted for the safety of the employees. The Supreme Court of Idaho in the case of Neil vs. Idaho & W. N. R. R., 125 Pac. 331, where this question was directly before the court in its decision on page 336 declares the law in respect to the assumption of the risk under this statute as follows: "Under the provisions of section four of said act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees, the defense of assumption of risk remains as at the common law." The question involved is whether the amended complaint or either count thereof states facts constituting actionable negligence, it is clear it does not when the facts alleged show that the injury resulted from open and obvious defects incident to the occupation, and we think that it is equally clear that the master violates no duty to the servant to protect him from risks and dangers which he knows or could have known by the exercise of ordinary care. We think the rule is well established by

the courts of last resort both State and Federal that to constitute actionable negligence in respect to risks and dangers other than those which are open and apparent to one using his sense of sight, it must be alleged and proven that the injury resulting from such risks and dangers were not known or could not have been known to the servant by the use of ordinary care, for the reason that the servant's ignorance of the conditions is a condition precedent and must be alleged and proven to entitle him to recover.

Martin vs. Des Moines Edison Light Company, 131 Iowa 724 (106 N. W. 359).

Vandalia Ry. Co. vs. Parker, 98 N. E. 705.

The same rule prevails in the Federal Courts where this subject has been considered and decided. It has been uniformly held that it is inherent in the servant's cause of action to allege and prove that the injury did not result from a risk assumed. Judge Taft, speaking for the Court of Appeals for the Eighth Circuit in the case of Narramore vs. Cleveland C. & C., St. L. Ry. Co., 96 Fed. 298 on page 301, states the rule as follows: "But the correct statement is that no right of action arises in favor of the servant at all for, under the terms of the employment, the master violates no legal duty to servant in failing to protect him from dangers the risk of which he agrees expressly or impliedly to assume; the master is not therefore guilty of actionable negligence towards the servant." The question was again before the Circuit Court of Appeals for the Eighth Circuit and Judge Lurton (now Mr. Justice Lurton of the Supreme Court of the United States,) speaking for the Court in the case of Chesapeake & O. Ry. Co., vs. Hennessey, 96 Fed. 713, expressly affirms the rule on pleading in respect to facts necessary to constitute actionable negligence in identically the same language used by Judge Taft in the Narramore case. The question was again before the Circuit Court of Appeals for the Eighth Circuit in the case of St. Louis Cordage Co. vs. Miller, 126 Fed. 495 at page 502. Judge Sanborn, speaking for the Court on the subject of pleading, affirms the doctrine of the Narramore and Hennessey cases in the following language: "No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against the risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from."

Hence we respectfully submit that the amended complaint tested by the authorities above cited and those cited by plaintiff in error under assignment of error No. 1, in its original brief in this cause does not state facts constituting actionable negligence, hence this Honorable Court erred in affirming the order of decision of the court below overruling defendant's general demurrer to plaintiff's second amended complaint.

II.

On the ground that the amended complaint and each count thereof, is indefinite and uncertain, we respectfully submit that said motion is well taken and call the attention of the Court to the following allegation in what plaintiff denominates his first cause

of action, the same being, the allegation to which this motion is directed, "and that plaintiff's said injuries were also caused by the insufficient number of brakemen to manage said cars, that said roadbed was defective and unsafe, that the brakes on said cars and the coupling apparatus was out of repair and unsafe, that the defendant did not inspect its roadbed and said cars, and did not furnish plaintiff a reasonably safe place in which to perform said work, and that defendant and its said servants so negligently and carelessly ran, managed and operated said freight cars and engine, whereby said collision was caused and plaintiff injured, as aforesaid." (Printed Rec. pp. 52-53), and we respectfully call the attention of the Court to the allegations in what plaintiff denominates as his second cause of action. The particular allegations to which the motion is directed are as follows: "that plaintiff's said injury was caused by the negligent manner in which defendant's employees having the then control of the engine, cars and signals at said point conducted themselves in the management of said cars, engine and signals, and was also caused by the negligence of defendant's officers, servants and employees, and was also caused by defects in defendant's ways, works, machinery, appliances, plant, cars, engine, tracks, roadbed and signals at said place, and by the defendant's neglect to formulate, promulgate, and enforce proper rules and regulations for the safety of plaintiff and his co-employees, in that defendant conducted its works by unsafe and dangerous methods, and did have an improper signal system, and an unsafe place for plaintiff to perform said work, and conducted its works by insufficient signals, material and men, in that defendant, charged with superintendence, control and command over plaintiff and his co-employees, negligently and carelessly conducted itself in and in connection with said (67) acts, control, and command, as a result of all of which, said four freight cars were permitted to collide with said engine, and as a result thereof plaintiff sustained said injuries." (Printed Rec. pp. 57-58.)

That the allegations complained of and to which the motion is directed, violates the express command of Par. 1289, R. S. Ariz. 1901, quoted on page 16 of original brief of plaintiff in error, would seem to need no additional authority than the statute quoted. Legal conclusions, opinions of the pleader and glittering generalities are not facts constituting a cause of action. The remedy for the defects complained of, is specially provided by Par. 1356 of the R. S. Ariz. 1901, as quoted on page 15 of plaintiff's in error, original brief, and the Courts of the United States are governed and controlled by the course of procedure in civil cases adopted by the Courts of the State, unless such procedure conflicts with Section 912 of the R. S. of U. S.

This pleading is a part of the record in the cause (Printed Record, pp. 60-67, inc.), which motion was by the Court overruled to which action of the Court defendant excepted. Printed Record, pp. 85-86.

III.

On the ground that the amended complaint and each count thereof, is double. This error is urged under assignment of error No. 4, (Printed Record, pp. 64-67, inc.). The several allegations set forth in the first and second counts of amended complaint in addition to deficient and unsafe roadbed, insufficient number of brakemen, failure to inspect, failure to furnish safe place, is the following allegation: "That brakes on said cars and couplings were out of repair and unsafe," thereby embodying in one count, two separate and distinct causes of action; one under the Federal Employer's Liability Act and the other under what is usually known as the Safety Appliance Act, permitting separate and distinct defenses, requiring different evidence to support the several distinct and separate causes of action alleged, and as to the second count, in said amended complaint, the motion to strike, should have been sustained for the reason that the facts alleged in said second count, are a mere summary of those set forth in the first count of the complaint. The rule is, that where the facts alleged in the second count, require neither more nor less evidence to establish them, than those in the first count, that the second count is a mere duplication of the first, and for this reason, the motion as to the second count, should be sustained, and we respectfully call the attention of the Court to the authority cited in support of this motion, under assignment No. 4, and particularly to the case of Lighter vs. Jackson, 35 N. E. 289. That this motion is a pleading in the cause a part of the printed record and will be found on pages 64-67 inc. Said motion was denied, to which action of the Court defendant duly excepted, pages 85-86 of the printed record. This motion should have been sustained even though the complaint be sufficient as against a general demurrer. Southern Elec. Ry. Co. vs. Hageman, 121 Fed., 262, and authorities cited under assignments of error Nos. 3 and 4.

IV.

On the ground that defendant did not waive its motion for a directed verdict at the close of plaintiff's evidence, by proceeding to introduce testimony in its own behalf, upon the issues in the case, and did not renew the motion upon the conclusion of all the evidence, for the reason that the uncontradicted evidence in the case was, that the plaintiff and defendant were engaged in switching cars in the local yards of the defendant company at Clifton. The action is based on the negligence of defendant while engaged in interstate commerce. That the defendant was, at the date of the injury, a common carrier, engaged in interstate commerce, is jurisdictional, and the facts which gave the Federal Court the right to hear and determine this cause, hence it follows that if the undisputed evidence at the close of plaintiff's case, showed that plaintiff and defendant at the date of the injury were not engaged in interstate commerce, the local Court would have no jurisdiction, and hence defendant's motion should have been sustained. The question of jurisdiction is never waived and it may be raised at any

time, either in the court below or in the Appellate Court on appeal. That switching cars at terminals or in local yards, is not interstate commerce and in support of this position, we most respectfully refer to the case of Erie Railway Company vs. United States, 197 Fed. 287.

V.

On the ground that exceptions to instructions assigned and urged under assignments 11 and 12 were seasonably taken, we most respectfully call the attention of this Honorable Court to the Bill of Exceptions of defendant (Rec. page 494) which is as follows:

"We also desire to except to the giving of each one of the instructions requested by the plaintiff and given by the Court, and we desire to except to the refusal of the Court to give each one of the instructions requested by the defendant and refused by the Court. We desire to except to each of these severally. I think beyond that we are not required to go.

"The COURT: I think that ought to be sufficient."

Be it further remembered that at the trial of said cause, and before the jury retired to consider their verdict, that the Court granted permission to the defendant to embody into its bill of exceptions, if it should tender one, its objections to the instructions of the Court to the jury more fully at length and in detail."

The record conclusively shows that defendant at the trial and before the jury retired to consider their verdict did object and duly except to the charge of the Court.

The Record on page 625 shows that on the 2nd day of January, 1913, it presented this bill of exceptions and that on said date the same was duly approved by the Court and made a part of the Record.

We respectfully refer the Court to the last three lines at the bottom of page 616, and the first two lines at the top of page 617 of the Printed Record which reads as follows: "The defendant in accordance with the permission of the Court heretofore granted it so to do, as before stated in this bill of exceptions, now upon tender of this bill of exceptions states more fully and in detail to said instructions, as follows and on pages 617 to and including page 620, objections and exceptions at greater length and more in detail than urged on page 495 of the record, before the jury retired to consider their verdict.

As to the exceptions to the refusal of the Court to give instructions requested by the defendant we refer the Court to that part of the defendant's bill of exceptions Printed Rec. pp. 621-624 and particularly to page 621, which is as follows: "Be it further remembered that at the trial of this cause, and at the proper time and before the jury retired the defendant requested the Court in writing to instruct the jury as follows." The Court is further referred to Printed Rec. pp. 621-624 for exceptions of defendant to the refusal of the Court to give the instructions requested by defendant.

We respectfully submit that defendant's bill of exceptions as shown in the printed record, conclusively shows that defendant excepted to the several parts of the charge of the Court, complained of

and further excepted to the refusal of the Court to give the several instructions requested by the defendant "before the jury retired, to consider of their verdict," and by order and direction of the court below, embodied in its bill of exceptions more at length and in detail, the exceptions urged in presence of the jury, before they retird to consider of their verdict. Hence we say that the exceptions to the charge of the Court complained of and the exceptions to the action of the Court, in its refusal to give instructions requested by the defendant, were seasonably made and for the reason stated. Those parts of the charge of the Court, presented and urged under assignments 11 and 12, were properly before the Court for its consideration and decision.

VI.

On the ground that the deposition of Dr. Dietrich is included in the bill of exceptance and made a part of the record in this case. The bill of exceptions of plaintiff in error consists of about 518 pages, beginning on page 107 and ending on page 625. The deposition of Dr. Dietrich appears in defendant's bill of exception beginning on page 446 and ending on page 455 of the printed record, hence it is clear that the deposition is included in the bill of exceptance and a part of the record in this case. To the action of the Court in excluding this deposition, defendant duly excepted and to the action of the Court in sustaining plaintiff's exception in the answer of the several interrogatories propounded, defendant duly excepted, record pp. 446-458, inc. The Court is further referred to defendant's bill of exception on this subject, on pp. 458-476, inc. Hence, we say that the deposition of Dr. Dietrich was properly before the Court for its consideration and decision and the Court is respectfully referred to authorities under assignment of error No. 19 in support of our position on this subject.

VII.

On the ground that the testimony of Dr. Stark, a witness offered by defendant, to prove the condition of plaintiff in respect to injuries alleged and particularly as to the condition of plaintiff's eye about two months subsequent to the date of the alleged injury, for the reason that the evidence of Dr. Stark was competent; the evidence clearly showing in our opinion, that at the date of the examination, Dr. Stark did not bear the relation of physician to plaintiff. This we think is clearly shown by the admissions of plaintiff in his evidence on this subject as shown in defendant's bill of exceptions on page 473-474, as follows:

"Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?"

A. I supposed that was the object—very likely.

Q. You understand when the examination was made that it was for the purpose of getting information for the company?

A. Yes.

Mr. KIBBEY: Now, we think it is competent.
The COURT: That is contradictory to the other.
Mr. SEABURY: Absolutely, Your Honor."

VIII.

On the ground that the exceptions of defendant to the action of the Court in refusing certain instructions requested by defendant were seasonably taken before the jury retired to consider their verdict, we most respectfully call the attention of the Court to plaintiff in error's bill of exceptions contained in the record on page 621, which is as follows:

"Be it further remembered that at the trial of this cause and at the proper time and before the jury retired, the defendant requested the Court in writing to instruct the jury as follows," and in view of this excerpt from defendant's bill of exception, we respectfully submit that exceptions to the order of the Court refusing to charge the jury as requested by the defendant, were properly made before the jury retired to consider of their verdict, hence the error complained of in the refusal of the court below to charge the jury as requested by defendant, is properly before this Honorable Court for consideration and decision. We most respectfully submit and urge in support of this petition for a rehearing that the bill of exceptions of the plaintiff in error should control and be considered by the Court in preference to the statements of the clerk in the court below. The grounds assigned by the plaintiff in error in support of its petition for rehearing, are based upon the bill of exception, while this Honorable Court seemingly bases its opinion, to some extent at least, on the Reporter's Notes in the court below, copied into the record. On the grounds stated and for the reasons set forth herein, and the authorities cited, we most respectfully submit that plaintiff in error's petition for a rehearing should be granted, and I hereby certify as Counsel for plaintiff in error that in my judgment, the grounds urged and the reasons therefor, are well founded, and that this petition for rehearing is not interposed for delay.

W. C. McFARLAND,
Attorney for Plaintiff in Error.

United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to-wit: the October Term A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Twenty-ninth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen:

Present: Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Charles E. Wolverton, District judge.

No. 2259.

ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Order Denying Petition for a Rehearing.

On consideration whereof, and good cause therefor appearing, it is hereby Ordered that the petition filed October 7, 1913, on behalf of the plaintiff in error for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Petition for Writ of Error and Order Fixing Amount of Supersedeas Bond.

The above named plaintiff in error The Arizona and New Mexico Railway Company respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that judgment has therein been rendered on the 8th day of September, 1913, affirming the judgment of the District Court of the United States for the District of Arizona in favor of the defendant in error Thomas P. Clark against The Arizona and New Mexico Railway Company for the sum of Twelve Thousand Six Hundred and Seventy-five Dollars ($12,675.) and costs. That on the 7th day of October, 1913, plaintiff in error the Arizona and New Mexico Railway Company filed its petition for a rehearing in the above entitled cause which petition for re-hearing was by this Court

denied on October 29th, 1913, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error wherefore The Arizona and New Mexico Railway Company prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be authorized and directed to sign, seal and issue said writ of error and that said Clerk be further directed to send the records and proceedings of said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found corrected according to the laws and customs of the United States as your petitioner will ever pray.

(Signed) WILLIAM C. McFARLAND,
Attorney for Plaintiff in Error.

Approved November 13, 1913.

Petition granted and writ of error allowed on giving bond in the sum of Fifteen Thousand Dollars ($15,000.) condition- as the law directs, this the 13th day of November, 1913.

(Signed) WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] Petition for Writ of Error and Order Fixing Amount of Bond. Filed Nov. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By [signed] Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Assignment of Errors.

Comes now The Arizona and New Mexico Railway Company by its attorney, William C. McFarland, and in connection with its petition for writ of error herein makes the following assignment of errors, which it will urge upon the prosecution of the said writ of error in the above-entitled cause to-wit:

1. That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the judgment of the court below.

2. That the United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the trial court properly overruled and denied defendant's gen-

eral demurrer to plaintiff's second amended complaint, and to each count thereof.

3. That the United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's special demurrer to plaintiff's second amended complaint, and each count thereof.

4. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's motion to make plaintiff's second amended complaint more definite and certain.

5. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's motion to strike said amended complaint from the files on the ground of duplicity.

6. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's objections at the trial of this cause in the court below before the introduction of any evidence that said second amended complaint, nor either count thereof stated facts, sufficient to constitute a cause of action against the defendant.

7. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly excluded the testimony of witness J. T. Kelly offered by defendant to prove the general reputation of plaintiff as a safe and conservative engineer, the defendant propounded to said witness the following questions to which said witness answered thereto as follows, to-wit:

Q. How long has Mr. Clark been operating that engine in switching cars there in that yard?

A. Well, I think up to that time about two years Mr. Clark had been on that engine, around about that time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. SEABURY: We object to the question as incompetent, irrelevant and immaterial.

The COURT: I sustain the objection.

Mr. MCFARLAND: We except to the ruling of the court.

(To the witness.)

Q. Do you know of any instances prior to the accident, say within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. SEABURY: We make the same objection.

The COURT: Same ruling.

Mr. MCFARLAND: We except. Now, if the Court please, we offer to prove by this witness that Mr. Clark for two years previous to

this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost daily within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

Mr. SEABURY: We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The COURT: The ruling made will stand.

Mr. MCFARLAND: It is denied?

The COURT: Yes.

Mr. MCFARLAND: To which we except.

8. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly sustained the objections of plaintiff to the testimony of Dr. H. H. Stark, a witness offered by defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received by plaintiff at the date of the alleged accident and particularly as to the condition of plaintiff's eye about two months subsequent to the date of the alleged injury. The evidence of said witness and as to the incompetency and disqualification of said witness are as follows, to-wit:

Dr. H. H. STARK, being called as a witness in behalf of the defendant and duly sworn, testified as follows:

Direct examination.

(By Mr. KIBBEY:)

Q. What is your name?
A. Dr. H. H. Stark.
Q. Where do you reside?
A. El Paso, Texas.
Q. What is your business?
A. Physician and surgeon.
Q. How long have you been engaged in the practice?
A. Sixteen years.
Q. And where?
A. St. Louis and El Paso—two years in St. Louis and fourteen years in El Paso.
Q. Are you a graduate of any medical college?
A. I am a graduate of the medical department of St. Louis University.
Q. Have you had any other educational opportunities?
A. Yes, I had a certificate of work with the University of Vienna, the University of Prague, and the Royal London Op-thalmic in London.
Q. Have you made any special department of medicine or surgery your business?

A. Eye and ear work.
Q. For what length of time?
A. I have done nothing but that for the last six years.
Q. Do you know the plaintiff in this case, T. P. Clark?
A. Yes sir.
Q. How long have you known him?
A. I have known him since June a year ago.
Q. Where did you see him?
A. At Clifton.
Q. At whose instance did you see him?
A. Mr. A. T. Thompson.
Q. Mr. Thompson was at that time connected with the defendant railway company?
A. Yes sir. I don't know what his position was at that time—he was the head of it.
Q. He employed you to visit Mr. Clark, did he?
A. Yes sir.
Q. Where did you see Mr. Clark?
A. At Clifton.
Q. Where in Clifton?
A. At the A. C. Hospital.
Q. Did you make any examination of him at that time?
A. Yes sir, I made an examination of his eyes.
Q. State what examination.

Mr. SEABURY: We object to the question, and ask leave to cross-examine this witness for the purpose of showing the witness' disqualification and incompetency.
The COURT: Very well.

(By Mr. SEABURY:)

Q. You say this examination took place in June, 1911?
A. Yes sir.
Q. At the hospital of the defendant company in Clifton?
A. Yes sir.
Q. Under the direction of Mr. Thompson?
A. Under his personal direction, you mean?
Q. Yes.
A. It was at his requent I examined him. I came there especially for that purpose.
Q. Did Mr. Thompson or the defendant company conduct the hospital?
A. No, but it is the only place I have to make such examinations.
Q. You wouldn't go there and make an examination simply because Mr. Thompson said so?
A. Yes.
Q. Without consulting the medical force?
A. Yes sir, if he wanted the case examined, because he is in charge of the whole road.
Q. Now, were you at that time in the employ of the defendant company?
A. No sir.

Q. Did you have any connection or affiliation with its medical department?

A. No sir.

Q. Or with its hospital?

A. No sir.

Q. Did Mr. Thompson pay you any fee?

A. He paid me for the examination

Q. He did?

A. Yes sir.

Q. How long did the examination take?

A. Why it probably took—I don't know—probably took a half or three-quarters of an hour.

Q. Did you recall what time of day it was?

A. You mean morning or evening?

Q. Yes.

A. No, I don't believe I do. I think it was in the morning, though I am not sure.

Q. Who was present at the time you made the examination?

A. Mrs. Clark was present and—I don't know—you see the thing is situated this way; people are going in and out of the room all the time, so there might have been other persons present, perhaps Dr. Dietrich might have been present.

Q. Was this in a public ward of the hospital.

A. No, it is in the ex-ray room—the darkroom.

Q. In a single room you conducted the examination?

A. Yes sir.

Q. Who was present?

A. Mrs. Clark was present. I had a conversation with her at the time. I know during a large part of the examination there was no one there but Mr. Clark, Mrs. Clark and myself.

Q. In other words, no other doctor was present.

A. Dr. Dietrich might have come in.

Q. Just in and out?

A. I am not positive—I know he wasn't there all the time.

Q. Did he participate in the examination?

A. No, he did not.

Q. Had you met Mr. Clark before that?

A. No, I never had.

Q. Who introduced you to him?

A. I don't know—it might have been one of the nurses. I don't know who introduced me. I don't remember. That has been a year and a half ago.

Q. Do you know how you were introduced to him?

A. What do you mean?

Q. I mean how you were introduced to him—in what capacity?

A. Me?

Q. Yes.

A. No, I don't.

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the introduction was

done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

Q. You don't think you did?

A. I don't remember.

Q. Now, Doctor, don't you know, as a matter of fact, that Mr. Clark assumed you were one of the regular physicians of the defendant?

A. I am not able to tell what Mr. Clark assumed.

Q. That is what I asked you. If you don't know, that is the answer. You didn't tell Mr. Clark you were from El Paso?

A. Now, I don't know whether I did or not. I think perhaps Mr. Clark knew it.

Q. How do you think he perhaps knew it.

A. I think in the conversation that occurred that he said he had heard of me.

Q. That was after you had gotten into the examination, wasn't it?

A. I don't know when it was.

Q. You don't remember?

A. No.

Q. What is your best recollection on that subject? Do you think you discussed El Paso before or after you began to examine him?

A. I don't remember.

Q. You have no recollection on that?

A. That wasn't the important thing to me.

Q. It might have been of vital consequence to him as it is now?

A. I don't know.

Q. How long did your examination take?

A. Between half an hour and an hour.

Q. Did you derive any information concerning his condition except at that examination?

A. The condition of his eye?

Q. I mean of his general condition.

A. Only the conversation with him.

Q. Only from conversations with him at that interview?

A. Yes sir.

Q. That is the extent of your knowledge and acquaintance of the facts of his case?

A. Of course I knew he was injured before I came up.

Q. So your only knowledge was derived at that interview?

A. As to the condition of his eye?

Q. Yes.

A. Yes sir.

Q. Did you make any other examination except as to the condition of his eye?

A. Other than that?

Q. Yes.

A. No.

Q. The information which he gave you—was the information

which he gave you necessary to enable you to treat his eye or to properly diagnose his case?

A. No, I think I could have made a diagnoses without him saying anything about it.

Q. You think you could?

A. Yes, you understand that is part of the routine of the examination—questioning a patient.

Q. In other words, that is the only method you have of securing the subjective symptoms.

A. Yes—objective symptoms, of course, we discover ourselves.

Q. So you can say that all the subjective symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes sir, that is right.

Mr. SEABURY: Now, if your Honor please, I would like to call Mr. Thompson.

The COURT: Very well.

A. T. THOMPSON, being recalled as a witness by counsel for the plaintiff for examination upon the question of the admissibility of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY:)

Q. Mr. Thompson, Dr. Stark has testified that you requested him to call and examine the plaintiff. Had you ever secured any consent from the plaintiff to permit Dr. Satrk to examine him?

A. No, sir.

Q. Do you know whether Mr. Clark knew that Dr. Stark was not one of the regularly employed physicians of the defendant?

A. I don't know what he knew.

Q. You do not? Dr. Stark testified that you compensated him for his attendance upon Mr. Clark on this occasion. He didn't mean that you compensated him out of your own pocket?

A. No sir.

Q. You did not so compensate him?

A. No, sir.

Q. Isn't it a fact that you compensated him out of the funds of the defendant?

A. Yes, sir.

Q. Isn't it a fact that the funds came from the Hospital fund to which the plaintiff among others contributed?

A. No, sir.

Q. From what fund did it come?

A. That was charged direct against the Arizona and New Mexico Railway, for it was in the nature of a special fee and wasn't subject to the society's fund.

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir, it did at that time.

Q. Will you please tell us what the privileges to workmen in the

employ of the defendant included with reference to medical attention in such department?

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital?

A. Yes, sir.

Q. That includes, of course, the diagnoses of a man's injuries at the company's hospital?

A. Oh, yes.

Q. And there was no limitation of restriction, was there, as to the kind of medical attention which the company was to accord to the injured employee?

A. No, there was no limitation, if I understand you right.

Q. No difference between a general and a specially employed doctor?

A. It is a recognized thing that the company has its own physicians and surgeons, and these are the men that attend to any patients—company patients—who may go into the hospital and who are entitled under the fees they have paid into the society for their attendance.

Q. But the fact is, as you have already stated, that the defendant did compensate Dr. Stark for his medical attendance upon the plaintiff in this particular instance?

A. Yes, sir.

Q. I ask you if there was anything that you know of which would disclose or tend to disclose to the plaintiff any difference in Dr. Stark's connection with the defendant and other physicians who were in attendance upon him?

A. I cannot conceive how Mr. Clark would connect Dr. Stark with the society in any way.

Q. It is a fact that the examination took place in the hospital?

A. So the doctor says. I don't know where it took place.

Q. Is it the defendant's or the Arizona Copper Company's?

A. It doesn't really belong to the railroad company or the Copper Company. It belongs to the society.

(By Mr. KEARNEY:)

Q. Has the society any legal existence as a copartnership or a corporation?

Mr. MCFARLAND: That is a legal conclusion.

Mr. KEARNEY: Do you know as a matter of fact whether it has articles of incorporation?

The COURT: What difference does it make?

Mr. KEARNEY: My information is that it is only separate in name—neither a corpartnership nor a corporation.

Mr. MCFARLAND: It is immaterial whether it is a copartnership or a corporation.

The COURT: I don't think that makes any difference here.

Mr. SEABURY: I renew the objection already urged. I think we have shown the existence of the relation of patient and physician to have existed between this witness and the plaintiff.

The COURT: I don't think you have shown the existence of the relation of physician and client. The best that you can say in that behalf is that the plaintiff may have understood that any communication he gave to the doctor that that relation existed. Under the testimony thus far adduced the fact is just otherwise.

Mr. SEABURY: But, if your Honor please, we claim as a matter of law that when a company undertakes to supply medical treatment to its employees who are injured and actually makes a reduction from the salary or wages of the employees——

The COURT: I understand all that.

Mr. SEABURY: That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The COURT: That is unquestionably true, and on that theory I ruled out the declarations of Dr. Dietrich.

Mr. SEABURY: We claim, further, that there is no difference as a matter of law between special employment and a general one.

The COURT: I understand this examination was in reference to this law suit.

Mr. SEABURY: There is no testimony to that effect.

The COURT: The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. SEABURY: I don't know what the purpose of it was.

The COURT: If it was, of course then that ends it.

Mr. SEABURY: Suppose it was for the purpose of negotiating a settlement, it would be improper for us to go into that purpose.

The COURT: It must be established that he was Mr. Clark's physician.

Mr. SEABURY: We admit that, but we think that under these circumstances he has the right to claim it.

Q. You don't think from Mr. Thompson's statement that the employment of the doctor was under that society arrangement, whatever that was? He stated quite the contrary?

Mr. SEABURY: I think it was a special arrangement, undoubtedly he has testified the remuneration did not come out of that special fund, but I don't think that would change the course of conduct of the defendant.

The COURT: The thing in my mind is simply this: Whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had a good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. SEABURY: Then the surrounding circumstances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have been previously examined under in the hospital under a doctor of the association.

The COURT: It doesn't make any difference where it occurred, in his house or elsewhere, if he was there as a hostile witness to get

information—not for his benefit, but for somebody else's benefit, and if the plaintiff understood that at that time, he certainly—the communication, whatever it was, was certainly not privileged.

Mr. SEABURY: May I ask if the plaintiff understood that there was no difference between this doctor and Dr. Dietrich, for example? Would that effect the court?

The COURT: I am inclined to think so. The only thing is whether the circumstances were such as to put Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physicial, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. SEABURY: May I call the plaintiff to ascertain what he understood in this matter?

The COURT: Yes.

THOMAS P. CLARK, the Plaintiff, being recalled as a witness by counsel for the plaintiff upon the question of the admission of the testimony of the witness Stark, and having been heretofore duly sworn in this case, testifies further as follows:

(By Mr. SEABURY:)

Q. Mr. Clark, do you remember the day Dr. Stark examined you?

A. I remember him examining me very well.

Q. Had you ever seen him before that?

A. No, sir.

Q. Had you been examined by any other doctors of the defendant in the same place?

A. No, sir.

Q. You never had?

A. No.

Q. You knew, however, that that was the hospital?

A. Yes, sir.

Q. Did you know where the hospital was and what it was?

A. Yes, sir.

Q. Tell us what the hospital was where you were examined?

A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which injured employees of the defendant are examined?

A. Yes, sir.

Q. Did you know that to be the fact at the time of your examination?

A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Stark?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it?

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you in reference to the purpose for which that examination was requested or required?

A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company, or for your benefit?

A. I don't know.

Q. You don't know for whose benefit it was to be made?

A. For my benefit, I suppose.

Q. Is that what you understood?

A. Yes.

Q. Did you or did you not believe that Dr. Stark was in consultation with Dr. Dietrich, your attending physician?

A. Yes, sir.

Mr. KIBBEY: You are leading him right along.

The COURT: I think the communication is privileged—I will sustain the objection.

(By Mr. KIBBEY:)

Q. You say Dr. Dietrich was there?

A. He might have been in and out.

Q. As a matter of fact he wasn't in town, was he?

A. Yes, sir, I think so.

Q. You had a conversation with Dr. Stark, didn't you?

A. Yes, sir.

Q. In the course of that conversation did you state to Mr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

Mr. SEABURY: We object to the question.

The COURT: I sustain the objection.

(By Mr. KIBBEY:)

Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

Mr. SEABURY: We make the same objection.

The COURT: Same ruling.

(By Mr. KIBBEY:)

Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work or anythink of that kind?

Mr. SEABURY: We object.

The COURT: Is this a general examination—isn't it as to this matter of the competency of this doctor?

Mr. KIBBEY: I am trying to get the matter of the competency of this doctor.

Mr. SEABURY: The question is did you have any talk with the company. I don't see what——

The COURT: You may answer.

The WITNESS: No, sir.

(By Mr. KIBBEY:)

Q. You had not had any talk with any of them up to that time?
A. No, sir.
Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye?
A. I told Dr. Diedrich about it and he made the appointment with the doctor, I suppose.
Q. Didn't Dr. Diedrich tell you the company wanted an examination made for their information as to your condition and didn't you so understand it?

Mr. KEARNEY: We object to that as a privileged communication.
The COURT: I overrule the objection.

The WITNESS: I told Dr. Diedrich about it and he tried to examine it himself, and then he made the date with Dr. Stark a few days afterwards.
Q. Didn't you understand it was for the information of the company, to find out what the condition of your eye was?
A. I supposed that was the object—very likely?
Q. You understood when the examination was made that it was for the purpose of getting information for the company?
A. Yes.

Mr. KIBBEY: Now, we think it is competent.
The COURT: The answer is contradictory to the other.
Mr. SEABURY: Absolutely, your Honor.
Mr. KIBBEY: Yes, it is.
Mr. SEABURY: However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness's testimony both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.
Mr. KIBBEY: It is quite obvious to the contrary.
Mr. SEABURY: We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know——
The COURT: I will put a question.

(To the witness): Q. What did you understand was the object of this examination of your eyes?
A. To know whether it was injured or not.
Q. What difference did it make whether it was injured or not in your judgment?
A. It would make a whole lot.
Q. In what way?
A. From good sight to blindness—I wanted that information.
Q. Who wanted it?
A. I did.

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Diedrich he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared there.

M. SEABURY: We think that makes it too clear, your Honor.

The COURT: I think so.

(By Mr. KIBBEY:)

Q. Did you know that Dr. Stark did not belong to the society's corps of physicians?

A. To what?

Q. To the society's staff?

A. No, I didn't know anything about it.

Q. Had you ever seen him before?

A. Not that I know of.

Q. Did you ever hear of his attending anyone else there before?

A. You say Dr. Diedrich or Dr. Stark?

Q. Dr. Stark?

A. I never heard of him at all.

Q. Had you heard of him before?

A. No, sir.

Q. You knew he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Diedrich said he would have their man.

Mr. KIBBEY: That is all.

9. The Court erred in its opinion and judgment in holding and deciding that it was precluded from considering various assignments of error in respect to giving and refusing certain instructions; for the reason that the exceptions thereto were not seasonably taken." That part of defendant's bill of exceptions which will be found in the printed record in the United States Circuit Court of Appeals for the Ninth Circuit, at page 621 shows that the instructions requested by defendant were seasonably made by the following excerpts from said bill, as follows, to-wit:

"Be it further remembered that at the trial of this cause and at the proper time and before the jury retired, the defendant requested the Court in writing to instruct the jury as follows."

That part of defendant's bill of exceptions on pages 621, 622, 623 and 624 of printed record in court below shows that exceptions to the action of the Court in refusing to give each of the requested instructions was seasonably made. The instructions requested by the defendant to the refusal of which defendant excepted are as follows, to-wit:

"If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of four cars to remain upon the main line after the engine had been detached

therefrom, without having set the brakes thereon or having chocked the wheels so as to prevent their rolling by their own gravity, and if the plaintiff was apprized of danger of any kind by a signal which the plaintiff knew signified an emergency under the practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case." Which instructions requested by the defendant were by the Court refused, to which action of the Court the defendant then and there excepted.

Be it further remembered that at the trial of said cause and at the proper time and before the time for the jury to consider of their verdict, the defendant requested the Court in writing to give the jury the following instruction:

"If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, then such movement must be attributable to accident, and if such movement was an accident the defendant is not liable in this case." Which instruction requested by the defendant was by the Court refused, to which action of the Court the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the retirement of the jury to consider of their verdict, the defendant requested the Court in writing, in the presence of said jury, to give to the jury the following instruction:

"Even if the defendant left cars under the circumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if the plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover." But the Court refused to give said instruction, to which ruling of the Court in so refusing to give said instruction the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the jury had retired to consider of their verdict, the defendant requested the Court in writing to give to the jury the following instruction:

"If after giving consideration to the condition of the tracks in question and all the surrounding facts and circumstances proven in the case, the jury believes that at the time of the accident in question the condition of the track in question and the handling and moving of the cars in question thereon was being performed in the manner usually adopted in well-managed and operated railroads

and generally recognized as good railroading, then the defendant was not guilty of negligence in so maintaining its railroad and operating its cars thereon in the manner in which it did so." But the Court refused to give said instruction, to which ruling of the Court in refusing to give such instruction the defendant then and there excepted.

Be it further remembered that at the trial of this cause and at the proper time and before the jury retired to consider of their verdict, the defendant requested in writing the Court to give to the jury the following instruction, that is to say:

"You are instructed that one entering into the service of the defendant with knowledge, actual or constructive, of the defects in the defendant's roadbed, or knowledge, actual or constructive, of the methods employed by the defendant in the operation of its cars in switching upon its main line, switches and industrial tracks, and remains in the service of the defendant with such knowledge, actual or constructive, without complaint, that he assumes all ordinary risks incident to his employment, and if injury results from such defects in its roadbed or by such methods of operation of its cars, that by such acquiescence he assumes the risk of injury, and cannot recover." Which instruction the Court refused to give, to which ruling of the Court the defendant then and there excepted.

And time was given, as hereinafter stated, within which the defendant could prepare and file its bill of exceptions to said rulings."

On page 621 of the printed record in the Court below, the same being a part of defendant's bill of exceptions, it will be shown that the defendant at the proper time and before the jury retired requested the Court to give the above and foregoing instructions. The part of defendant's bill of exceptions in respect to the proper time and before the jury retired be shown by the following excerpt beginning on page 629 as follows, to-wit:

"Be it further remembered that at the trial of this cause and at the proper time and before the jury retired, the defendant requested th Court in writing to instruct the jury as follows:"

10. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that said court was precluded from considering various assignments of error in respect to giving and refusing certain instructions "for the reason that the exceptions thereto were not seasonably taken." That part of defendant's bill of exceptions which will be found in the printed record below on page 494 shows exceptions to the instructions of the Court to the jury were seasonably made as will appear from the following excerpt from said bill which is as follows, to-wit:

"Mr. McFarland: We also desire to except to the giving of each one of the instructions requested by the plaintiff and given by the Court, and we desire to except to the refusal of the Court to give each one of the instructions requested by the defendant and refused by the Court. We desire to except to each of these severally. I think beyond that we are not required to go."

That said exceptions to the charge of the Court were taken before the jury retired to consider of their verdict and that said exceptions so made were extended more fully and in detail as shown

by defendant's bill of exceptions which will be found on pages 616 and 617 of the printed record in the court below, as follows, to-wit:

"The defendant in accordance with the permission of the Court theretofore granted it so to do, as before stated, in this bill of exceptions now upon the tendering *of* his bill of exceptions states more fully and in detail the objections to said instructions as follows:"

11. That the United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the Court below properly instructed the jury on the subject of contributory negligence, which said instruction is as follows to-wit:

"That is subject to the qualification that if the contributory negligence or the negligence of the plaintiff was so wilf*ill* and such a character as the jury might say that it was the direct cause of the injury, then the plaintiff could not recover by reason of such negligence."

The said Circuit Court of Appeals of the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly instructed the jury on the subject of negligence as appears in the printed record as follows, to-wit:

"I charge you further that even if defendant left cars under the circumstances detailed in this case on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of collision, yet if plaintiff was warned of danger and was given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger signal he could with the means at his disposal have stopped his engine and thus avoided the collission, and he then wilfully or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover."

12. The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly included in its judgment interest on the amount found by the jury, to-wit: Twelve thousand six hundred and seventy-five ($12,675.) dollars, that the same should draw interest at the rate of six (6) per cent per annum from date until paid.

Wherefore The Arizona and New Mexico Railway Company prays that said judgment of the United States District Court for the District of Arizona and the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the same, be reversed and that said District Court be instructed to enter judgment in favor of this defendant, or failing that, that the said court be instructed to grant a new trial in this cause.

(Signed) WILLIAM C. McFARLAND,
Attorney for The Arizona and New Mexico Railway Company, Plaintiff in Error.

[Endorsed:] Assignment of Error. Filed Nov. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by (signed) Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Order Allowing Writ of Error from Supreme Court U. S. and Fixing Amount of Supersedeas Bond.

On this 13 day of November, 1913, came plaintiff in error by William C. McFarland its attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it, praying also that a transcript of the records and proceedings and papers of said cause duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof said writ of error is allowed upon said plaintiff in error giving a bond according to law in the sum of Fifteen Thousand Dollars ($15,000.) which shall operate as a supersedeas bond and it is further ordered that said petition is hereby allowed and granted and that the writ of error be allowed in said cause returnable before the Supreme Court of the United States on the 12" day of January 1914, and that the Clerk of this Court is authorized and hereby directed to sign and seal the writ and that a transcript of all proceedings and papers in said cause shall be made and transmitted to the United States Supreme Court.

(Signed) WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Service of within order for writ of error, by receipt of a true copy admitted this the — day of November, 1913.

———— ————,
Attorney for Defendant in Error.

[Endorsed:] Order allowing writ of error from Supreme Court U. S. and fixing amount of supersedeas bond. Filed Nov. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By (signed) Meredith Sawyer, Deputy Clerk.

American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Company's Office Building, 100 Broadway, New York.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

[*Bond on Writ of Error from Supreme Court U. S.*]

Know All Men by These Presents:

That The Arizona and New Mexico Railway Company, a corporation, Plaintiff in Error, above named as Principal, and American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a Surety Company in the State of California, Surety, are held and firmly bound unto Thomas P. Clark, Defendant in Error, above named, in the full and just sum of Fifteen Thousand Dollars ($15,000.00) to be paid to the said Defendant in Error, to which payment, well and truly to be made, the said Principal binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Witness the names and seals of the said Principal and Surety this 13th day of November, 1913.

The condition of the above obligation is such that:

Whereas, at a session of the United States Circuit Court of Appeals for the Ninth Circuit, in a suit pending in said Court between The Arizona and New Mexico Railway Company, a corporation, Plaintiff in Error, and Thomas P. Clark, Defendant in Error, said Circuit Court of Appeals rendered a final judgment affirming the judgment of the United States District Court for the District of Arizona, said judgment by said District Court being in favor of Thomas P. Clark and against the said The Arizona and New Mexico Railway Company and being for the sum of Twelve Thousand Six Hundred and Seventy-five Dollars ($12,675.00) with costs,

And whereas the said plaintiff in error obtained a writ of error to reverse the judgment of the said United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the Clerk's office in said Court and a citation directed to Thomas P. Clark, Defendant in Error, citing and admonishing the said defendant in error to be and appear before the Supreme Court of the United States.

Now, if the said The Arizona and New Mexico Railway Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea

good, then the above obligation is to be void, otherwise to remain in full force and effect.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

(Signed) By W. C. McFARLAND,
Its Attorney in Fact.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
A Corporation Organized and Existing under and by Virtue of the Laws of the State of New York and Authorized to do Business as a Surety Company in the State of California.

(Signed) By H. J. DOUGLAS,
Resident Vice President.

Attest:
(Signed) V. H. GALLOWAY,
Resident Assistant Secretary.

Approved this the 13th day of November, A. D. 1913.
(Signed) WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] Bond on writ of error from Supreme Court U. S. Filed Nov. 13, 1913, F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By (signed) Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Præcipe for Transcript of Record upon Writ of Error from Supreme Court U. S.

To the Clerk of the said Court.

SIR: Please issue a single certified Transcript of the Record on return to Writ of Error taken by the Plaintiff in Error to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which the above-entitled cause was heard and determined in the said Circuit Court of Appeals, to which will be added a typewritten copy of the following-

entitled proceedings that were had and of the papers that were filed in said cause in the said Circuit Court of Appeals, viz:

2. Order of Submission, entered May 6, 1913;
3. Opinion, filed September 8, 1913;
4. Judgment, filed and entered September 8, 1913;
5. Order denying Petition for Rehearing, entered October 29, 1913;
6. Petition for Writ of Error to Supreme Court of United States;
7. Order allowing Writ of Error and fixing Amount of Bond;
8. Bond of Writ of Error to Supreme Court of United States;
9. Præcipe for Transcript of Record;
10. Clerk's Certificate;
11. Original Writ of Error;
12. Original Citation on Writ of Error;
13. Petition for Rehearing filed October 7, 1913.

(Signed) W. C. McFARLAND,
Counsel for Plaintiff in Error.

[Endorsed:] Præcipe for transcript of record upon writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals. Filed Dec. 29, 1913. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seven hundred and sixty-seven pages, numbered from and including one (1) to and including seven hundred and sixty-seven (767), to be a true copy of the complete record in the above-entitled cause, prepared pursuant to Præcipe therefor filed by counsel for the Plaintiff in Error, including all proceedings had therein, and including the Opinion and Assignment of Errors filed therein as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on return to the annexed Writ of Error from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco,

in the State of California, this twenty-third day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

In the Supreme Court of the United States.

No. —.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

The President of the United States of America to the United States Circuit Court of Appeals for the Ninth Circuit, and the Honorable Judges thereof, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said United States Circuit Court of Appeals for the Ninth Circuit between The Arizona and New Mexico Railway Company, a corporation, plaintiff in error, and Thomas P. Clark, defendant in error, a manifest error hath appeared to the great d mage of said plaintiff in error as by his complaint appears, and it being fit and we being willing that the error if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to this the Supreme Court of the United States together with this writ, so you have the same in the said Supreme Court at Washington, D. C. within 60 days from the *the* date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein, to correct that error, what of right and according to the law and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this the 13th day of November, in the year of our Lord One Thousand Nine Hundred and Thirteen.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

Allowed by
WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Service of within Writ of Error by receipt of a true copy admitted this the 17th day of November, 1913.

L. KEARNEY,
Attorney for Defendant in Error.

[Endorsed:] Docketed. No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. The Arizona and New Mexico Railway Company, Plaintiff in Error, vs. Thomas P. Clark, Defendant in Error. Writ of Error from Supreme Court U. S. Original. Filed Nov. 26, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the thirteenth day of November, A. D. 1913, duly lodged in the cause in this Court for the within named defendant in error.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Supreme Court of the United States.

No. —.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Thomas P. Clark and to L. Kearney and W. M. Seabury, your attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. on the 12 day

of January A. D. 1914, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit wherein The Arizona and New Mexico Railway Company is plaintiff in error and you Thomas P. Clark is defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 13th day of November, A. D. 1913.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Service of within citation by receipt of a true copy admitted this the 17th day of November, 1913.

L. KEARNEY,
Attorney for Defendant in Error.

[Endorsed:] Docketed. No. 2259. United States Circuit Court of Appeals for the Ninth Circuit. The Arizona and New Mexico Railway Company, Plaintiff in Error, vs. Thomas P. Clark, Defendant in Error. Citation on Writ of Error from Supreme Court U. S. Original. Filed Nov. 26, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

In the Supreme Court of the United States.

No. —.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THOMAS P. CLARK, Defendant in Error.

Order under Rule 2, Section 1, of the Rules of the Supreme Court of the United States, Enlarging Time to and Including February 2, 1914, within which to File Record Thereof and to Docket Cause in said Supreme Court.

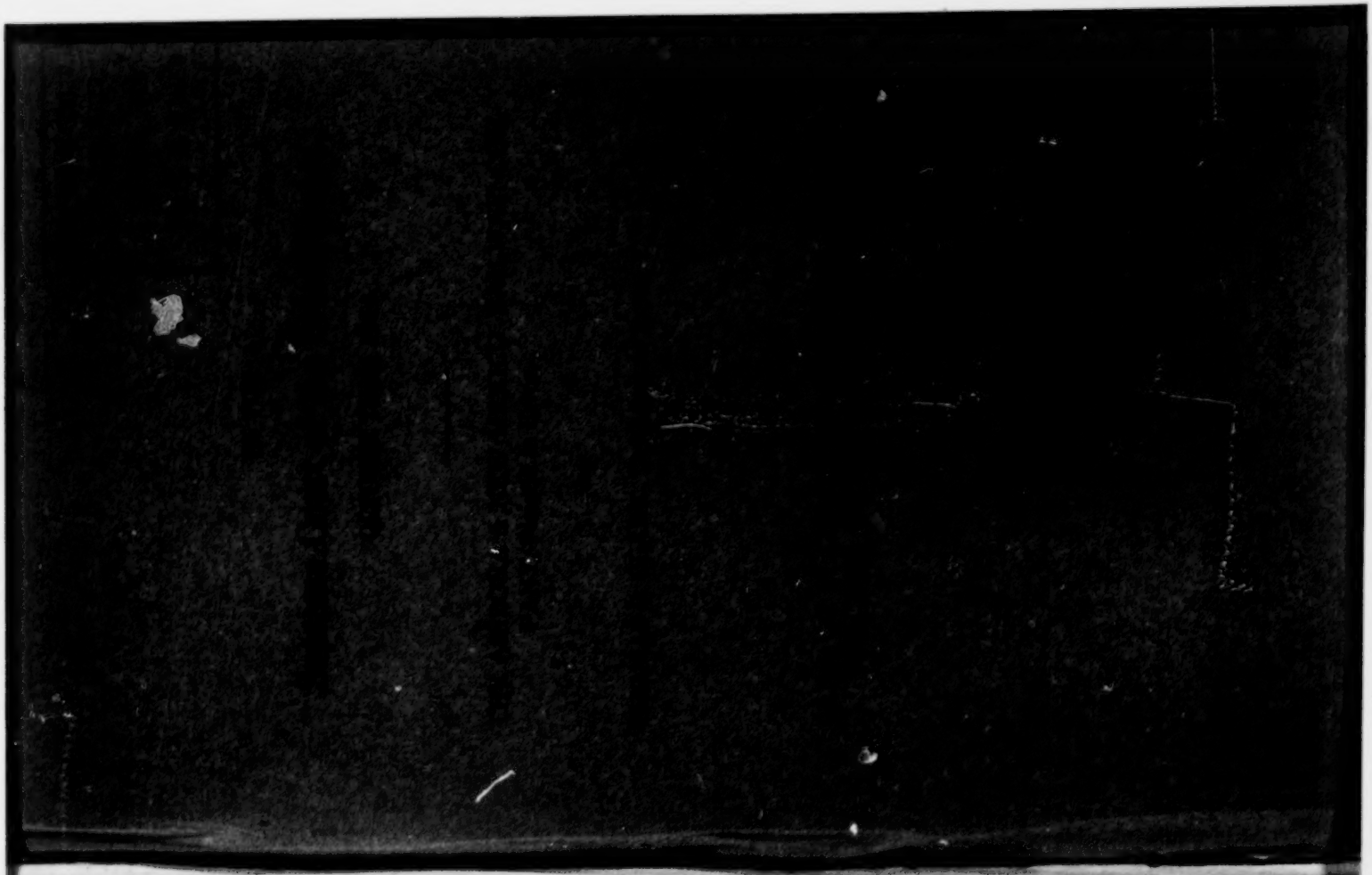
Good cause therefor appearing, it is hereby ordered that the time within which the original certified Transcript of the Record on writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause may be filed, and within which the plaintiff in error therein may docket the cause in the said Supreme Court be, and hereby is enlarged to and including the second day of February, A. D. 1914.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 12th day of January, 1914.

[Endorsed:] No. —. October Term, 1913. In the Supreme Court of the United States. The Arizona and New Mexico Railway Company, a Corporation, vs. Thomas P. Clark. Order under Rule 9, Section 1, enlarging time to and including February 2, 1914, within which to file record thereof and docket cause.

Endorsed on cover: File No. 24,037. U. S. Circuit Court Appeals. 9th Circuit. Term No. 347. The Arizona and New Mexico Railway Company, plaintiff in error, vs. Thomas P. Clark. Filed January 29th, 1914. File No. 24,037.



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IN THE SUPREME COURT OF THE UNITED STATES.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, Plaintiff in Error.

vs.

THOMAS P. CLARK, Defendant in Error.

No. 347.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION FOR AFFIRMANCE OF JUDGMENT.

Plaintiff in error concurs in the statement of defendant in error contained in his printed motion, with exception of that part beginning with the words, "and thereafter," on line 6, page 4, and ending with the words, "in that court," on line 10, said page, and respectfully submits, that it appears upon the record, that this cause was not transferred or removed from the Territorial Court to the trial court below and in that court duly tried, pursuant to the provisions of the Enabling Act approved June 20, 1910, Sec. 33.

The jurisdiction of this court to review the judgment of the intermediate court of appeals on writ of error is not challenged.

Before proceeding to reply to brief of defendant in error for affirmance of judgment, we desire to call the attention of the Court to the question of the jurisdiction of the trial court to hear and determine this action. We quote from brief of Defendant in Error (Page 4) as follows:

"At the date the injuries were received and when the action was commenced, Arizona was a Territory and the suit was begun in the District Court of the Territory of Arizona, in the 5th Judicial District.

On February 14, 1912, the Territory of Arizona became a state, and thereafter, pursuant to the provisions of the Enabling Act, approved June 20, 1910, Section 33, the cause was removed or transferred to the United States District Court for the District of Arizona, and thereafter duly tried in that Court."

Appellants 15th assignment of error in this court challenges jurisdiction of the United States Court for the District of Arizona over the subject matter of this action and in succession challenges the jurisdiction of the intermediate appellate court and of this honorable court over this action.

As appears in transcript of record (Vol. 1 P. 1) plaintiff instituted his cause of action in the District Court of the 5th Judicial District of the Territory of Arizona on the 18th day of January, A. D. 1912, the territorial government of the then territory of Arizona and it's concomitant territorial judiciary being then extant. Thereafter as appears from the said transcript of record, (Vol. 1, P. 17) this plaintiff filed his amended complaint in the District Court of the United States for the District of Arizona on the 4th day of April A. D. 1912, the territory of Arizona having on the 14th day of February, A. D. 1912 been admitted to the union, at which date the territorial system was extinguished. Plaintiff filed his amended complaint as aforesaid in the District Court of the United States for the District of Arizona, not by way of instituting his action initially in that court, but as a transfer of the acton initiated in the territorial court, to the District Court of the State of Arizona.

Plaintiff's cause of action was predicted and tried solely upon the provisions of the so-called Federal Employers' Liability Act, being that act of April 22, 1908, Chapter 149, 35 Stat. L. of the United States 65 and the amendments thereto. It is provided by the provisions of this act and its

amendments that all causes of action arising by reason thereof shall fall within the concurrent but not the exclusive jurisdiction of the Federal Court.

Sec. 33 of the Enabling Act referring to the admission of the territory of Arizona as a State, provides precisely and in detail for the transfer of cases of whatsoever character pending in the Territorial Courts at the time of the admission of the territory as a State to the proper Court, state or federal, as the circumstances as by the act prescribed shall warrant. It is there provided as follows:

> "Should a case or controversy (i. e. pending in any of the territorial courts, other than the Supreme Court of the territory at the date of its admission) be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a Circuit or District Court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said state of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature of one which under such general judicial provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for the removal of cases from State to Federal Courts, and not later than 60 days after the lodgment of the record of such case or controversy in the proper court of the state as herein provided. All files, records and proceedings relating to any such pending cases or controversies shall be transferred to such Circuit, District and State Courts respectively in such wise and so authenticated are proven as such courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law."

The transcript of record discloses (Vo. 1, P. 33) that on the 13th day of April A. D. 1912, plaintiff below filed his ap-

plication in the Superior Court of the County of Gila, State of Arizona, for the removal of his cause of action from that Court to the District Court of the United States for the District of Arizona. The record discloses (Vol. 1, P. 32) that the said Superior Court of the county of Gila, State of Arizona, refused the request for such removal, upon the ground set forth and made a part of the record (Transcript ofRecord Vol. 1, P. 32) that all the records and files of this cause had prior to the filing of said motion for removal, been transfered to said United States District Court, and that the same never were lodged in nor became a part of the record of said Superior Court; and that said Superior Court had not jurisdiction of said action, and thereupon returned all of the papers referring to said application for removal.

By this examination of the record it is clear that plaintiff's cause of action, one which if instituted within a state would have fallen within the concurrent but not the exclusive jurisdiction of the Federal Courts, was pending before the Territorial Court on the date of the admission of the Territory of Arizona as a State and that the record and files of the cause then pending in the territorial court were never transferred to the proper state court and that plaintiff below never procured the removal or transfer of this action from the said proper state court to the United States District Court for the District of Arizona in the way and manner and within the time provided by the Enabling Act. It does appear that the records and files of the cause as and when pending before the Territorial Court at the date of the admission of the territory as a state were placed in a basket and by some leger-demain of counsel, picked up bodily and with every possible violation of the provisions of the law relative thereto, taken from the territorial court to the U. S. District Court for the District of Arizona,without order or request of territorial, state or federal court.

It is submitted that by the provisions of the Enabling Act, as above quoted, upon the admission of the territory of Arizona as a state, the jurisdiction of this cause was by operation of law transferred to the proper state court of the state of Arizona, where it has at all times since and does now re-

pose; that the jurisdiction of the state court over this action has always remained and is now to the exclusion of the jurisdiction of every other court, and that only the act of the parties to this cause in full compliance with the provisions of the Enabling Act with the approval of the proper courts can effect a transfer of this jurisdiction from the state court to the federal court and thereby confer any jurisdiction upon the latter.

The provision of the Enabling Act to the effect that all cases and controversies pending at the admission of the state and not transferrable to the district or circuit court under the provisions of the act, shall be heard and determined by the proper court of the state, must conclusively mean that all cases and controversies so pending and not transferred as provided by the provisions of the Enabling Act shall be heard and determined by the proper court of the state; of such actions upon such contingency the Enabling Act makes the jurisdiction of the state court exclusive.

Other than by general demurrer the question of the jurisdiction of the United States District Court for the District of Arizona over this cause has remained unquestioned until raised in this court.

Whether the District Court of the United States for the District of Arizona had or had not jurisdiction of this cause brought before this Honorable Court upon writ of error to the United States Circuit Court ofAppeals for the 9th Circuit is a question that this court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits; consent or acquiescence of the parties cannot confer jurisdiction.

Parker vs. Ormsby 140 U. S. 81.
Metcalf vs. City of Watertown 128 U. S. 586.
MacDonald vs. Smalley, 1 Pet. 620.
Mansfield Etc., Ry. Co. vs. Swan et al, 111 U. S. 379.

The courts of the United States inferior to this Honorable court have not jurisdiction except as conferred by congress. Congressional legislation is necessary to enable those courts after admission into the union to take jurisdiction of cases previously commenced in the courts of the territory, and not finally adjudged before the admission of such territory to the union.

Koenigsberberger vs. Richmond Silver Mining Co., 158 U. S. 41.
Freeborn vs. Smith, 2 Wall 160.
U. S. Exp. Co. vs. Kountze, 8 Wall 342.
Baker vs. Morton 12 Wall 150.

These last cited cases giving a broad effect and construction to legislative acts disposing of cases pending before territorial courts at the time of the admission of the territory to the union, and allowing jurisdiction of Federal Courts over such cases, arose over acts of the U. S. congress providing for the admission of various territories to the union, which were singularly insufficient in providing for the transferance and disposal of various classes of cases upon the change from territorial to state government. These cases arose where congress had utterly failed to make provisions for the transferance either to a federal or a state court of a certain class of cases, and it thereupon became incumbent upon this Honorable Court to give a broad construction to such acts in order to escape defeating the right of the final adjudication of such cases instituted in the territorial courts; if some such construction were not afforded, such actions would necessarily have abated for lack of a court of competent jurisdiction to take them over upon extinguishment of the territorial judicial system. However in the instant case, our Enabling Act provides specifically for the method of transfer—and particularly names the competent forum under the new State system. Construction of such statutes is useless and needless to protect the rights of parties litigant before the territorial courts on the date of the admission of

the territory as a state. Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning evident.

An examination of the Enabling Act discloses that the jurisdiction of such causes as the instant case, pending in a territorial court at the time of the transition from territorial to state government is by operation of law transferred to the proper state court.

U. S. vs. Alamagordo Lumber Co. 202 Fed. 700.

Where a state court has lawfully acquired jurisdiction of a cause no transfer of that jurisdiction to a national court can be made otherwise than according to the provisions of a law authorzing it.

Bluebird Mining Co., Ltd. vs. Murray et al. 45 Fed. 388

The provisions of Sec. 33 of the Enabling Act relative the State of Arizona are identical with those upon the same subject matter in the Enabling Act of N. M., each being incorporated within the same enactment by the U. S. Congress. The question here presented with a slightly different application was passed upon by the Circuit Court of Appeals of the 8th Circuit in the case of U. S. vs. Alamagordo Lumber Co. (Supra), wherein a decree had been rendered in one of the District Courts of the territory of New Mexico on Dec. 22, 1911. A writ of error was issued to review it on Jan. 5, 1912. The state of New Mexico was admitted to the union on Jan. 6th, 1912, whereupon the court which rendered the judgment ceased to exist. The writ of error was never filed or lodged in the federal court nor with the court which rendered the judgment before it ceased to exist. This case was one which if begun within a state would have fallen within the concurrent and not within the exclusive jurisdiction of the circuit or district courts of the United States. The Cir-

cuit Court of Appeals held that the case was pending in the territorial court on the date of the admission of the territory of New Mexico as a state; that no application to remove the case to the U. S. District Court in the state of New Mexico as prescribed by the enabling act was ever made but the files and records in the case were taken to that court pursuant to its order.

Quoting from the syllabus by the court:

> "Under Sec. 15 of the Enabling Act of New Mexico (Act June 20, 1910, C. 310, 36 Stat. 566) the jurisdiction of any case pending in any court of the territory of New Mexico other than the Supreme Court thereof, at the time of its admission as a state, which was such that if begun in a state, it would have fallen within the concurrent and not within the exclusive jurisdiction of a circuit court or a district court of the United States, was transferred by operation of law to the proper state court.
>
> In the absence of an application by any party to such a case made as nearly as might be in the manner provided for the removal of cases from state courts to federal courts not later than 60 days after the lodgment of the record of such case in the proper state court for its removal to the U. S. District Court in the state, the jurisdiction of that court over such case, its files and records did not attach."

Circuit Judge Sanborn in his decision in part speaks as follows:

> "The case was such that, if commenced within a state, it would have fallen within the concurrent, and not within the exclusive, jurisdiction of a court of the United States, under the laws of the United States touching the jurisdiction of its courts, and it and all the files and records in it were therefore, by the provisions of section 15, which has been recited, transferred, not to any of the United States courts, but to the proper state court of the state of New Mexico. The case might

indeed have been removed to the United States court in that state within 60 days after the lodgment of the files and records in it in the proper state court by means of a petition, and "application, as nearly as may be, in the manner now provided for removal of causes from state to federal courts," but not otherwise.

However, it never was so removed and under the Enabling Act the case which was pending in the United States District Court of the territory on Jan. 6, 1912,its files and records, have ever since that date been, and still remain, within the jurisdiction of the proper state court. The next sentence after the removal provision in Section 15 reads:

"All cases and controversies pending at the admission of the state, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the state." Glaspell vs. Northern Pacific Railroad Co., 144 U. S. 211, 214, 219,220, 233, 12, Sup. Ct. 593, 36, L. Ed. 409.

It goes without saying that in the face of timely objection, which has been made in this case, the United States District Court in the state was without power, in the absence of an "application of any party to such cause or controversy, to be made as nearly as may be in the manner now provided for removal of causes from state to federal courts, and not later than 60 days after the lodgment of the record of such case or controversy in the proper court of the state," to transfer this case, or any case of like character, or the files or records thereof, to that court, and in so far as the other of that court of March 30, 1912, has, or was intended to have, that effect, it is ultra vires and void, because it is contrary to the express provisions of the act of Congress which has been quoted. The unavoidable result is that no court but the proper state court to which the Enabling Act transferred the jurisdiction of the district court in the territory over this case, its files and records, has

since the admission of the state, ever had any jurisdiction over it or them.

The jurisdiction of the United States District Court in the state and of its clerk over this case and its files and records has never attached because, the case has never been removed from the proper state court to which the enabling act transferred it. Hence the clerk of the United States District Court in the state had no power or authority to certify and return here a transcript of the files and records of the distict court in the territory which rendered the judgment, files and records of which the proper state court and its clerk alone had jurisdiction, and, as the clerk of that state court has returned no transcript, there is no lawfully authenticated record of those files and proceedings in this court upon which it can act.

But the act of Congress clearly and without any ambiguity expresses the intention of Congress that the jurisdiction of all cases pending in all of the courts of the territory other than the Supreme Court which, if begun within a state, would have fallen within the concurrent jurisdiction of the state and the federal court, should be transferred to and vested in the proper state court, and that the jurisdiction of the United States District Court in the State should never attach to any of them unless some party thereto instituted and prosecuted an application and proceeded to remove it to that court in the way customarily employed to remove cases from the state courts to the federal courts. Construction and interpretation have no place or office when the language of a statute is unambiguous and its meaning evident. In such a case arguments from the history of legislation, from the possible or even probably, evil effects of a statute and from the inconvenience of complying with it, and attempted judicial construction of its terms, serve only to create doubt and to confuse the judgment. They tend to obscure, rather than to elucidate, the meaning of the statute.

Again, this act of Congress expressly transfers the jurisdiction of all the courts of the territory other than the Supreme Court over all cases pending therein, which if begun in a state, would have fallen within the concururent jurisdiction of the state courts and the federal courts to the proper state court. It contains no exception from this general transfer of cases of this nature pending in the United States District Courts of the judicial districts of the territory. And where legislative body has included in a statute by general language many subjects, persons, corporations, or cases, and made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to do so."

The maxim, that consent cannot give jurisdiction applies. The parties did not and could not waive the question involved.

Home Life Ins. Co. vs. Dunn, 19 Wall 214.
Removal cases 9 Otto 291, 25 L. Ed. 600.
Mansfield & etc. Ry. Co. vs. Swan et al, 111 U. S. 379.

To hold that the jurisdiction of the Federal Court attached in this case would result in a most injurious conflict between state and federal jurisdiction; such a holding would permit the parties in actions in State Courts by agreement among themselves to transfer actions to the Federal Court, conferring upon it jurisdiction which exists only by statute, in absolute violation of the laws prescribing the limits of, and the manner of acquiring, jurisdiction by such courts.

Between courts having concurrent jurisdiction, the one which first obtains possession of a controversy must be allowed to dispose of it finally. The Enabling Act expressly and definitely gave first and exclusive jurisdiction of this cause to the State Court upon the admission of the territory to the union, to be divested only in the manner and within the time prescribed by the act.

Freeman vs. Howe, 24 How 450.
Hagan vs. Lucas 10 Pet. 400.

The instant case presents the question of the assumption of jurisdiction by succession and not by removal; the procedure for acquiring either way however, is wholly statutory and rules applicable to rights under removal are pertinent to the questions of jurisdiction by succession. Where a petition and bond have been filed with the State Court, that court is ousted of its jurisdiction and the parties may not force a resumption of jurisdiction by the State Court by consent.

Home Life Ins. Co. vs. Dunn, Supra.
Lawton vs. Blitch 30 Fed. 641.

As appears from the transcript of record as above indicated, the plaintiff below appealed to the Superior Court of the County of Greenlee, State of Arizona, to have the record transferred to the Federal Court. The State Court refused to grant the request, erroneously assuming that it was without jurisdiction in the case, whereas the controlling law had fixed jurisdiction in the State Court finally until properly divested. The effect of the denial by the State Court was to retain the jurisdiction over this case exclusively in the State Court; in effect the refusal of the State Court to transfer the action to the Federal Court was a denial of the right of plaintiff below to so remove the action; right or wrong, the State Court retained unto itself exclusively the jurisdiction of this case. The proper procedure thereupon was to have tested the right of the State Court to refuse the motion of the plaintiff below to remove the cause to the Federal Court in the proper court for the review of such action by the State Court. This was absolutely necessary to confer jurisdiction upon the Federal Court in the light of the action of plaintiff below and of the State Court, and of the provisions of the Enabling Act. As far as the proceedings in the Federal

Court are concerned it has been attempted to give that Court jurisdiction not by virtue of removal or attempted removal under removal statutes, but by succession; as already pointed out, the Federal Court could not acquire jurisdiction over this case as by right of succession; for that has been expressly forbidden by the Enabling Act.

Wherefore, plaintiff in error respectfully submits that the trial court, intermediate court of appeals, and this honorable court, were and are without jurisdiction over the subject matter of this action and prays this honorable court for such order or orders as shall appear meet and proper in the premises.

REPLY OF PLAINTIFF IN ERROR TO BRIEF ON MOTION TO AFFIRM.

The records in this cause have not been printed under Rule X of this court and the motion of defendant in error does not direct the attention of the court to any specific error or errors assigned and urged for reverssal nor any particular question or questions in the record on which the decision of this court depends that are so frivolous as not to need further argument. In such a situation this court has uniformly held that motions of this character will not be entered as the questions involved should be considered when the case comes on for final hearing.

Crane Iron Co. vs. Hoagland, 108 U. S. 5.

In the case of Call vs. Palmer, 16 Otto 39, this court held that motions under this rule shoulud be accompanied by an agreed statement of facts of the cause or by such abstracts from the record as will show that the case is one to which the rule applies.

The court of appeals for the 6th circuit in the case of Erie Ry. Co. vs. Kennedy, 191 Fed. 332, in passing upon this question under a rule of that court identical with Rule XXI

of this court, sustains the principle contended for and is in line with the decisions of this court on the subject as shown by an excerpt from the decision on page 337 as follows:

> "We are not inclined to search the record for support of allegations of error when defendants brief does not indicate where such support may be found."

In the case of Portland Cement company vs. U. S. 15 Wall, 1, this court held that a brief disregarding Rule XXI, the proceeding in which it was filed would be dismissed.

In the case of Williams vs. First Nat'l. Bank, 216 U. S. 582, this court very clearly drew the line between frivolous questions for which it would affirm judgments under Rule VI and questions presented that may be found without merit which would justify an affirmance at the hearing in substance as follows:

> "Questions presented under the several assignments of error may be without merit but it does not follow logically or legally that they are frivolous and urged for delay."

Should the court be disposed to entertain the motion in the situation stated, in order to relieve it of the burden of searching the entire record covering 696 pages without waiving the right to present and urge other errors assigned and questions raised in the record and defendants bill of exceptions at the final hearing on the merits, plaintiff in error most respectfully asks the indulgence and attention of the court to the consideration of a few of the many errors assigned and questions raised in the record which we most confidently submit conclusively show that the motion is not well taken nor the grounds urged sustained by the record in the cause. The errors urged and the questions raised to which the attention of the court is especially directed by plaintiff in error in opposition to motion to affirm will be stated in numerical order the first designated as:

ERROR NO. 1.

The intermediate court of appeals erred in its opinion and judgment in affirming the judgment of the trial court overruling defendant's general demurrer to plaintiff's second amended complaint. (Rec. pp. 47-59) Demurrer (Rec. p. 69-70) order overruling demurrer (Rec. pp. 85-86) Exceptions (Rec. p. 86) (Assignment of Errors p. 628.)

The sufficiency of the complaint was also raised by objections to any evidence in the cause (Rec. p. 108) objections overruled (Rec. p. 109) Petition for new trial (Rec. p. 98,) assignment of Errors (Rec. p. 628.)

The insufficiency of the complaint was urged in the intermediate court of appeals both under the demurrer and objections to any evidence and the learned court speaking through Judge Ross affirmed the judgment of the trial court in overruling the demurrer and denying motion on the following grounds:

"It is readily conceded that the complaint might well have been more concise, logical and clear; but we are of the opinion that its manifest defects are not fatal."

A. & N. M. Ry. Co. vs. Clark, 207 Fed. 817.

We respectfully submit the complaint and each count thereof is not only manifestly defective but fatally so.

The first count of the second amended complaint (Rec. pp. 47-59), the sufficiency of which is challenged by the demurrer and motion, contains a number of alleged breaches of duty by defendant, among others as follows: "Failure to set brakes on cars left standing on main line of defendant's railway," "Negligently signaling plaintiff to stop his engine," "Insufficient number of brakemen," "Defective and unsafe roadbed," "Brakes and couplings of cars out of repair and unsafe," "Failure to inspect," "Failure to furnish safe place for servants," "Negligent operation."

The second count also contains a number of alleged breaches of duty among others as follows: "Negligent management of operation," "Negligence of officers, servants and employees of defendant," "Defects in defendant's ways, works, machinery, plan, cars, engines, tracks, roadbed and signals," "Neglect to formulate rules," "And enforce proper rules," "Unsafe and dangerous methods of operation," "Improper signal system," "Unsafe place," "Conducted the works by insufficient signals, material and men."

The general demurrer and motion should have been sustained to both counts of the complaint for the reason that no facts are alleged constituting negligence, each and every allegation being a conclusion of law, not supported by any averment of fact, simply opinions of the pleader.

S. P. Ry. vs. Campbell, 189 Fed. 182, 186.
Gould vs. E. & C. Ry. Co. 91 U. S. 526.
Vandalia Ry. Co. vs. Parker 98 N. E. 705.
Fogg vs. Blair, 139 U. S. 118.
Whitten vs. Tomlinson, 160 U. S. 231.

The general rule of law on this subject imposes upon the master the duties of furnishing his servants reasonably safe appliances, machinery and working places and to keep them in a reasonably safe condition of repair.

Choctaw O. & G. Ry. Co. vs Holloway 114 Fed. 458.

This general rule in respect to duties of the master is not an absolute one, but limited and qualified by another rule that the servant assumes all the ordinary risks and dangers incident to the service in which he is engaged, so far as they are known, or through the exerciseof care could have been known to him. That the general rule is limited and qualified is expressly held in Bethlehem Iron Co. vs. Weiss, 100 Fed. 45. The same doctrine is announced in the following cases:

Tuttle vs. Detroit G. H. & M. Ry. Co. 122 U. S. 189
S. P. Ry. Co. vs. Seley 152 U. S. 153.
In the case of Kohn vs. McNulta 147 U. S. 238,

Justice Brewer speaking for the court in substance said, that the master violates no duty to the servant in failing to protect him from open and obvious risks incident to the service for the reason that the master is not negligent in failing to protect the servant against assumed risks.

It is apparent at a plance that each and every ground of negligence alleged in the complaint and each count thereof were so patent as to be readily observed by plaintiff in the reasonable use of his senses.

Hence it follows that a complaint which alleges that injury resulted from risks assumed fails to state facts constituting a cause of action, for the reason the law imposes no duty on the master to protect the servant from injury resulting from assumed risks. No breach of duty, no negligence, hence no legal liability.

Bush vs. Mo. Pac. Ry. Co. 12 Pac. 582.
Singleton vs. Felton, 101 Fed. 526, 529.
Bohn Mfg. Co. vs. Erickson, 55 Fed. 943.
Johnson vs. S. P. Ry. Co. 117 Fed. 462.
Labbatt's Master and Servant Vol. 4. Sec. 1626, p. 4951 (1913 Ed.)
Tuttle vs. Detroit G. H. & M. Ry. Co. 122 U. S. 189.
McDade vs. W. & G. Ry. Co. 135 U. S. 554.
Standard Oil Co. vs. Brown, 218 U. S. 78.

This is true in respect to risks and dangers attributable to the employers negligence.

Chicago M. & St. Ry. Co. vs. Donovan 160 Fed. 826.
Medina Valley Irr. Co. vs. Espino, 214 Fed. 732 (A. S. Fed. Rep. Sept. 3. 1914.)

In Seaboard Air-Line Ry. vs. Horton 233. U. S. 492, Mr. Justice Pitney speaking for the Court in an action based upon the Federal Employers' Act on the subject of assumption of the risk uses this language: "When the employee does know of the defect and appreciates the risk that is attributable to it, then if he continues in the employment without objection or without obtaining from the employer or his representative, an assurance that the defect will be remedied, the employee assumes the risk even though it arises out of the master's breach of duty."

The rule of assumption of the risk under the Federal Employers' Act remains the same as under the common law with the single exception, that it does not apply "in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Mundo vs. N. Y. N. H. & H. Ry. Co. 223 U. S. 1.
Central Vermont Ry. Co. vs. Bethune 206 Fed. 868.
Seaboard A. L. R. Co. vs. Horton U. S. (Supra.)
Neil vs. Idaho & W. Ry. Co. 125 Pac. 331.

There are no facts alleged in either count of the complaint negativing actual or constructive knowledge of plaintiff of any of the numerous defects which he alleges caused or contributed to his injury.

Mr. Labatt in his masterly and exhaustive treatise on the subject of master and servant (1913 Ed.) Vol. 4, Sec. 1626, p. 4951 after a careful and painstaking review of all the cases, Federal and State, lays down the rule of pleading on the subject of actionable negligence as follows:

"Where the risk from which the injury is alleged to have resulted was, so far as appears, an ordinary or an obvious one, the complaint is demurrable, unless it states some facts, which if proven, will remove the case from the

operation of the rule which charges a servant with the assumption of such risks." The cases sustaining the author's position on this subject will be found in the notes 1 and 2 under Sec. 1626, Vol. 4 p 4951. Also see Sec. 1166 Vol. 3 Note 2, p 3100.

That the rule of pleading contended for by plaintiff in error prevails in the federal courts is sustained practically by all the decisions of these courts, where this question has been considered and determined. Judge Taft speaking for the court in the case of Narramore vs. Cleveland C. C. & St. L. Ry. Co. 96 Fed. 298, on page 301 lays down the rule as follows:

"Assumption of the risk is a term of the contract express or implied from the circumstances of the employment by which the master agrees that the dangers of injury obviously incident to the discharge of the servants duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat right of action on the ground that the servant causes or contributes to cause the injury to himself.

But the correct statement is that no right of action arises in favor of the servant at all, for under the terms of employment the master violates no legal duty to the servant in failing to protect him from dangers the risks of which he a reed expressly or impliedly to assume. The master is not therefore guilty of actionable negligence towards the servant."

This case is cited with approval by this court in the case of Schlemmer vs. Buffalo R. & P. Co. 220 U. S. 590. Also cited and approved in the case of Chespeake & O. Ry. Co. vs. Hennessey 96 Fed. 713.

The rule is approved in the case of St. Louis Cordage Co. vs. Miller 126 Fed. 496, on page 501. Judge Sanborn says, "No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur."

The case of Baker vs. Barber Asphalt Pav. Co. 92 Fed. 117, the court on p 120 states the rule in the following language, "The logical sequence therefore of this proposition is that as to the servant the master is not chargeable with actionable negligence for an injury sustained by the servant from an obvious defective appliance or dangerous place well known to him when he enters the service and undertakes to work in such a place, and the proof of the fact is involved within the terms of the allegations of the petition as it establishes the fact that no cause of action ever existed in favor of deceased, or his legal representatives.

The following cases are to the same effect:
Ind. Mfg. Co. vs. Wells 68 N. E. 319.
Goff vs. Ry. Co., 36 Fed. 299.
Owl Creek Coal Co. vs. Goleb 210 Fed. 209.
Dixon vs. Wes. U. Tel. Co. 68 Fed. 630.
Thompson vs. C. M. & St. P. Ry. Co. 18 Fed. 239.
Kinzel vs. At. K. & N. Ry. Co. 137 Fed. 489.
Brown vs. King, 100 Fed. 561, 572.
McLeod vs. C. M. & St. P. Ry. Co. 117 Pac. 749.

The same rule in respect to pleading in negligence cases prevails in state courts as abundantly shown by the following authorities:

C. C. C. & St. L. Ry. Co. vs. Parker 56 N. E. 86.
McAndrews vs. C. L. S. & E. Ry. Co. 78 N. E. 603.
Glavin vs. Boston Ry. Co. 100 N. E. 614.
Peterson vs. N. P. C. & C. Co., 49 N. E. 8.
Standard Cement Co. vs. Minor, 100 N. E. 767.
Lake Erie & W. Ry. Co. vs. Wilson 59 N. E. 573.
Salem Bedford Stone Co. vs. Hodds 42 N. E. 1022.
Evansville & T. H. Ry. Co. vs. Duel, 33 N. E. 355.
Crown vs. Orr, 35 N. E. 648.
Indiana Mfg. Co. vs. Wells, 68 N. E. 319.
Hinckley et al., vs. Peay et al., 60 Pac. 1012.
Drake vs. U. P. Ry. Co. 21 Pac. 560.

Minty vs. U. P. Ry. Co. 21 Pac. 660.
Smith vs. Butner, 27 Pac. 29.
Joice vs. City of Worchester, 4 N. E. 565.
Rice vs. L. & N. Ry. Co. 9 S. W. 288.
Mo. Pac. Ry. Co. vs. Summers 9 S. W. 741.

The servants knowledge of the conditions is a condition precedent to his recovery.

Toledo W. W. Ry. Co. vs. Fredericks 71 Ill. 294.
Evans vs. Meridith S. & L. Co. 38 Atl. 1099.
Strattnor vs. Wellington C. E. Co. 50 Atl. 57.

A very satisfactory explanation for the failure of plaintiff to negative knowledge actual or constructive will be found in his testimony at the trial, printed Rec. p. 188 as shown by the following questions and answers:

(q) So far as you know during the two years you were engineer on the switching engine, were the brakes set up on the cars left standing on the main line before being switched up to the Shannon switch?

(a) As far as I know there was not any brakes set on them at all.

(q) Was that true during the entire two years you had charge of the switch engine?

(a) Yes sir.

ERROR NO. 2.

The intermediate appellate court erred in its opinion and judgment in affirming the judgment of the court below overruling defendant's special demurrer. (Rec. pp. 85-86). To that part of plaintiff's complaint to which the special demurrer was directed will be found beginning with the 4th line from the bottom of page 52 and ending with the 8th

line on page 53, for the reason that the same are a bunch of legal conclusions.

S. P. vs. Campbell, 189 Fed. 182.
Mobile Savings Bank vs. Board of Sup. 22 Fed. 580.
James vs. City Invest. Co. 188 Fed. 513.
A. T. & S. F. Ry. Co. vs. Oneill, 30 Pac. 470.
Vandalia Ry. Co. vs. Parker, 98 N. E. 705.

ERROR NO. 3.

The intermediate appelate court erred in its opinion and judgment in affirming the judgment of the trial court in overruling defendant's motion to make the complaint and each count thereof more definite and certain. (Rec. pp. 60-85-86). Revised Statutes of Arizona, 1901, Sec. 1356 provides as follows:

> "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion and when a pleading is double and does not conform to the statute or when allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion or require it to be amended."

The parts of the complaint to which the motion was directed will be found in the last four lines of page 52 and the first 8 lines of page 53 and also beginning on the 3rd line from the bottom of page 57 and ending with the words "and as a result thereof plaintiff sustained said injuries" on page 58, for the reason that each and every of the allegations contained in the parts of the complaint referred to are legal conclusions and simply opinions of the pleader.

Wilson vs. N. E. Nav. Co. 197 Fed. 88.
S. P. vs. Campbell.....189 Fed. 182.
Ruthe.ford vs. Foster, 125 Fed. 187.
Hieronymus vs. N. Y. B. & L. Ass'n. 101 Fed. 12.
In re Dunn, 181 Fed. 701.

Mobile Savings Bank vs. Board 22 Fed. 580.
Picotte vs. Watt 31 Pac. 805.
Griffith vs. Wright, 58 Pac. 582.
Webber vs. Dillon 54 Pac. 894.
Carlisle vs. People, 59 Pac. 48.
History Co. vs. Dougherty 3 Ariz. 387.
Cal. State Tel. Co. vs. Patterson 1 Nev. 150.
City of Buffalo vs. Holloway, 7 N. Y. 492.
City of Logansport vs Kihm, 64 N. E. 595.

ERROR NO. 4.

The intermediate appelate court erred in its opinion and judgment in affirming the judgment of the court below in overruling defendants motion to strike plaintiff's second amended complaint from the files on the ground that each count thereof is duplicitious. In the first count a large number of separate and distinct causes of action are alleged, among others one under the Federal Employers' Liability Act, and in the same count beginning with the last line on page 52 of the record and ending on the 2nd line of page 53, a cause of action under the Safety Appliance Act is alleged as follows:

> "That the brakes on said cars and coupling apparatus was out of repair and unsafe."

The second count of the complaint is based on the Federal Employers' Liability Act and on page 58 it is alleged that "the injury was also caused by defects in machinery, appliances and cars," clearly uniting two separate and distinct causes of action under two different statutes in the same count. That the same is duplicitious and should have been stricken or plaintiff required to amend is sustained by the following cases:

Par. 1356 R. S. Arizona 1901 (Supra) under assignment No. 3.

Pomeroy Code Rem. (1904 Ed.) Sec. 446, page 611.
Also see case cited Note 1, page 612.
Williard vs. Corrigan 8 Ariz. 70.
Fox vs. Rogers, 59 Pac. 538.
Bankston vs. Ill. Cent. Ry. Co. 196 Fed. 171.
D. & R. G. Ry. Co. vs Sipes, 47 Pac. 287-289

The motion should be sustained to the second count of the complaint for the reason that it is a duplication of the first.

Leiter vs. Jackson, 35 N. E. 289.

INSTRUCTIONS.

ERROR NO. 5.

The intermediate court of appeals erred in its opinion and judgment in declining to consider errors assigned and urged to certain instructions given by the trial court also in its decision and judgment declining to consider errors assigned and urged to the action of the trial court in refusing to certain instructions requested by defendant on the sole ground that "Exceptions thereto were not seasonably taken" (207 Fed. 823) and quotes a part of the order of the trial court set forth in defendant's bill of exceptions on p 494 of the printed record in the cause in the court below to sustain the judgment in this respect.

The entire order of the court is as follows:

> "Be it remembered that the trial of this cause and before the jury retired to consider of their verdict, that the court granted permission to the defendant to embody in it's bill of exceptions if it should tender one, its objections to the instructions to the jury more at length and in detail."

The expression in the opinion that "The record shows that after the jury had retired in charge of the bailiffs, cer-

tain exceptions were taken by counsel for the respective parties," the learned court of appeals seems to have been influenced to a certain degree if not entirely in its opinion and judgment by statements of the court reporter on pages 492-3 and part of page 494, than by the order of the court. It would seem clear that the express order of the court would be controlling, and considering the question from this standpoint, it is equally clear, in fact as plain as language could express, that the trial court by this order granted the defendant "permission to embody in its bill of exceptions objections to the instructions of the court more fully and at length and in detail" (than) "at the trial of said cause, before the jury retired to consider of their verdict." It is clear objections were made "at the trial of said cause" and the trial court by the express terms of the order, "granted permission to the defendant to embody in the bill of exceptions more at length and in detail" objections "to the instructions more at length and in detail" than those urged at "the trial of said cause and before the jury retired to consider of their verdict," hence, we submit the learned court of appeals was in error in it's opinion and judgment in holding and deciding it was "precluded from considering errors assigned to giving certain instructions for the reason exceptions thereto were not seasonably taken."

If any doubt is entertained on this subject, the position of defendant is supported by the further order of the trial court which will be found in defendants bill of exceptions contained in the record on last part of page 424 and first part of page 425 which is as follows:

> "And be it further remembered that on the 22nd day of November, and within the time allowed by the rules of this court for the preparation, allowance and filing of bills of exceptions, the parties to this cause, by their respective counsel, appeared in open court, and thereupon, upon motion of the defendant, further time, to-wit, ten days from and after the 26th day of November, 1912, was given the defendant by the Court within which to prepare, present and file its bill of exceptions to the rulings of the Court made at the trial of this cause."

The learned appellate court below cites, Phelps vs. Mayer 15 How. 161 as sustaining its position, but we respectfully submit there was no pretense in this case that any exceptions were ever takn at the trial, but on the contrary in the opinion it is expressly stated the verdict was rendered on the 13th, the next day the 14th, exceptions were filed. The court further holds in this case that exceptions in substance should be taken at the trial but need not be "drawn up in form" until presentation of bill of exceptions.

In Hunnicutt vs. Peyton 12 Otto 333 Mr. Justice Bradley on page 354 speaking for the court lays down the correct rule in respect to exceptions as follows:

> "It is no doubt necessary that exceptions should be taken and at least noted before the rendition of the verdict, but the reduction of bills to form and the signature of the Judge to the bills required for their attestation or as said in statute of Westminister "for a testimony" may be afterwards, during the term. In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The statute of Westminister did not require it. It would greatly and uselessly retard the business of courts, were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that the exception need noly be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. But when an exception has been taken at the trial and noted, reducing the exceptions to form afterwards and attesting it is not making a new case, it is merely verifying the case as it appeared on the trial."

This court in a number of cases, to the end that right and justice may prevail and that substance shall not be sacrificed to form, has recognized and enforced the broader and more liberal rule in respect to errors in the record, than the one adhered to by the learned appellate court below, that

plain error will be noticed in the absence of any assignment of error.

Burnett vs. Butterworth, 11 How. 669.
Rodgers vs. Burlington, 3 Wall, 661.
Coughlan vs. Columbia, 106 U. S. 11.
Moline Plow Co. vs. Webb, 141 U. S. 623.
United States vs. Tenn. & Coosa R. Co. 176 U. S. 242.
White et al vs. U. S., 202 Fed. 501.

ERROR NO. 6.

The learned court of appeals erred in it's opinion and judgment in refusing to consider the errors assigned by defendant to the refusal of the trial court to give instructions requested by defendant on the ground that "exceptions thereto were not seasonably made."

Defendants bill of exceptions Rec. pp. 621-2-3 and part of page 624 shows the defendant requested the court in writing to give five separate and distinct instructions, the record cited further shows that the request for each of the several instructions was made at the bar of the court in the presence of the jury, as follows:

> "Be it further remembered at the trial of this cause and at the proper time and before the jury retired, the defendant requested the court in writing to instruct the jury as follows: And exceptions to the action of the court in refusing each of the requested instructions was duly made and noted by the court. Hence we respectfully and confidently submit that the exceptions were timely made and properly before the learned court for consideration, and it's refusal denied the defendant a substantial right to the it's prejudice and injury."

And hence seasonably taken and properly before the court for consideration.

ERROR NO. 7.

The learned Court of Appeals erred in its opinion and

to which ruling of the Court defendant excepted(Rec. p 450.) Each of the remaining forty-nine interrogatories and answers were objected to by plaintiff and sustained by the Court. To the action of the Court in sustaining objections to each of the remaining questions and answers the defendant excepted, and the same were duly noted by the Court (Rec. pp. 453 to 458, inclusive.)

The decision of the Trial Court was evidently based upon the general rule excluding privileged communications and in the abstract is doubtless correct, but, like other rules, has its qualifications and limitations. Should a party to an action testify to his injury, and what was said and done by the physician in charge, or when a party to the action voluntariy introduces a witness who testifies to the injury, diagnosis, treatment, and whatever was said and done by the physician covering his entire treatment, the seal of privilege is broken and he waives the privilege, and exempts the evidecision in declining to consider assignments of error urged and based upon the refusal of the Trial Court to admit in evidence the deposition of Doctor Dietrich on the ground that the deposition is not included in the bill of exceptions, though printed in the transcript. (207 Fed. 821.)

The printed record, to which the Court refers, contains the entire deposition of Dr. Dietrich and will be found on pp. 664 to 667, inclusive, and is a part of defendant's assignment of error, designated as No. XIX.

The defendant's bill of exceptions, beginning on p. 446 and ending on p. 458, contains, as does the record referred to in the Opinion of the Court, the entire deposition of Dr. Dietrich. This deposition was introduced, as shown by defendant's bill of exceptions, in evidence without objection by plaintiff. See pp. 446, 449. The first twenty-three interrogatories and answers were read to the jury without objection. Interrogatory No. 24 was read, but the answer was objected to by plaintifl and sustained by the Court on the ground that it appears from the examination of this witness that he is incompetent to testify regarding the injuries received under Par. 2535, R. S. of Arizona, 1901 (Rec. p 450),

dence of the physician, relative to communications, from all objction on the ground that it is confidential or privileged, because the evidence of plaintiff or the client has made it public. That such is the situation in the instant case and comes clearly within the exceptions stated to the general rule is clearly and conclusively shown by the testimony of Rebecca Manes, a witness voluntarily offered and examined by plaintiff at the trial of the cause. Her testimony on direct and cross-examination will be found in defendant's bill of exceptions (Rec. pp. 503 to 513, inclusive), and is as follows, omitting caption and certificate:

DIRECT EXAMINATION.

My name is Rebeckah Manes; age 32, and I reside at Metcalf, Arizona, and am employed as a housekeeper for my husband.

Q. What was your vocation on March 15th, 1911?

A. Called as a nurse to Mr. Clark.

Q. And you nursed Mr. Clark following his injuries on the railroad, of March 15, 1911?

A. Yes, Judge.

Q: What doctor treated him?

A. Dr. Dietrich.

Q. When were you called to nurse Mr. Clark?

A. Sixteenth of March, 1911.

Q. What experience have you had as a nurse?

A. Experience in medical, surgical nurse, hospital and outside practice.

(505)Q. Are you a graduate of any institution?

A. Sister's Hospital, Los Angeles, California.

Q. When you were called did you make an examination of Mr. Clark? A. What do you mean?

Q. In reference to the injuries he received.

A. Yes, Sir; when I arrived in the morning Dr. Dietrich was there and he was examining Mr. Clark and of course, I looked on.

Q. He was examining Mr. Clark? A. Yes, sir.

Q. State, then, what was the condition of Mr. Clark.

A. At that time he didn't state all his injuries.

Q. Did you yourself make an examination of his injuries?

A. Yes, sir, I noticed there was some new injury that was not noticed the first day I was there.

Q. What was that?

A. Injury of the lung.

Q. What did the injury consist of?

A. To my knowledge it was a fracture.

Q. Of What? A. Of the ribs.

Q. What other injury?

A. Other injuries were (interrupted).

(506)Q. Any injury about the face or head?

A. The left eye was sore and injuries of the rib in the lumbar regions.

Q. And an injury to the left eye?

A. I don't know as it was an injury but his eye was sore.

Q. Old or fresh sore?

A. Fresh one to my knowledge.

Q. Did Dr. Dietrich at that time treat the eye?

A. Gave me instruction what to do.
Q. What did he tell you to do?
A. Bathe it frequently with boracic acid solution.
Q. How long did you give that treatment?
A. During the time I was there, a week.
Q. Did you make a discovery of any other physical injury?
A. No, not any more than the pneumonia that developed.
Q. When was that?
A. I am not positive the day it developed.
Q. In reference to the upper broken rib that you speak about, did Dr. Dietrich tell you about it first or did you tell him?
A. I drew Dr. Dietrich's attention first, to a discoloration on the skin over the lung.
(507)Q. How long afterwards was that? How long after the doctor had been treating, did you call his attention to that condtiion?
A. I presume the second or third day.
Q. And you kept a record of the temperature and every day's symptoms? A. Yes, sir.
Q. What do you call the record.
A. Clinical Chart or record sheet.
Q. For whose benefit did you keep that chart?
A. Doctor's.
Q. Each day you were there attending Mr. Clark, Dr. Dietrich called for that chart? A. Yes, sir.
Q. Did you show it to him?
A. Usually had it on the dresser and he picked it up and looked at it.
Q. Did Dr. Dietrich give you any instructions in reference to the care of Mr. Clarke or say anything about his condition?
A. Said had to watch Mr. Clark very closely for his condition was very serious, pneumonia developing with other injuries would prove fatal possibly.
Q. Can you state further anything that occurred?
A. Why, there were several instructions he gave, that is in regard to the seriousness of his condition.
(508)Q. Basing your opinion upon your experience as a nurse and from your observation and examination of the physical condition of Mr. Clark, would you say that his injuries of which he was suffering and of which you were attending and treating as a nurse, were slight or of a serious nature?
Objected to by counsel for defendant on the grounds that witness has not qualified as an expert and second, as not a question of opinion.
A. Serious.
Q. Why do you say that they were serious? What is your reason?
Objected to by counsel for defendant on same grounds.
A. Owing to the several injuries Mr. Clark received and afterwards developing into pneumonia.
Q. At the time you were nurse what was his diet?
A. Liquid and soft diet.
Q. Why were they given?
A. Because his condition was so that solid food would be injurious to him.
Q. You took his temperature? A. Yes, sir.
Q. Was the temperature of Mr. Clark taken by Dr. Dietrich?
A. Yes, sir, while I was not there during his first visit.
Q. You was not there?
A. I was there the morning of the 16th.
(509)Q. Dr. Dietrich took the temperature of Mr. Clark at that time?
A. I presume he did.

Q. Do you know whether any request was made for specimens for examination?

A. I don't remember.

Q. What is your recollection?

A. No, no specimens were called for but it seems to me they saved some specimens for Dr. Dietrich.

Q. Did he get them?

A. Yes, sir, I think so. Mrs. Clark was ill at the time.

Q. Did you room awhile in the house of the plaintiff in this action?

A. Roomed and boarded eight months with Mr. and Mrs. Clark.

Q. Covering what period of time?

A. From November until the following April.

Q. What year was that? A. 1900, I believe.

Q. Was that a year before this accident or more?

A. Two years.

Q. State when you were there if Mr. Clark read a good deal.

A. Yes, he read a great deal when I was there.

Q. Plaintiff read a good deal at night?

(510)A. Did most of his reading at night, to my knowledge.

Q. Use glasses? A. Yes, Judge.

Q. This is your clinical report? (Produces report.) Did you make this from actual observation?

A. Yes, sir.

CROSS EXAMINATION.

(By McFarland and Hampton).

Q. Did you not see Mr. Clark until the second day after the accident? A. No, Judge.

Q. Where was he when you first saw him?

A. At his home, in bed.

Q. In Clifton? A. Yes, sir.

Q. What time of day did you go down?

(511)A. Down from Metcalf on the morning train, a little after nine, I should think.

Q. About nine o'clock? A. Yes, Judge.

Q. Was Dr. Dietrich there when you went in?

A. Yes, sir.

Q. He had seen him previous?

A. Yes, Sir.

Q. Did he complain of his wounds the first day you were there?

A. Yes, Judge.

Q. Of what particular wounds did he complain?

A. Of the injured hip and up here (indicating the chest).

Q. Injury developed by pneumonia in the apex?

A. Yes, Sir.

Q. Did you notice that the first day you saw him?

A. Did not notice this over the lung.

Q. Did you know whether Dr. Dietrich had noticed this before?

A. He didn't; no.

Q. Mr. Clark was perfectly rational?

A. Yes, Judge.

Q. You would consider one with wounds he had from this accident with indications of pneumonia pretty serious case with anybody, woudn't you?

A. Most always.

(512)Q. Would it be more serious with him than anybody else?

A. If they had injuries it would be.

Q. A serious condition? A. Yes, sir.

Q. There was a little inflammation in one eye?

A. Yes, Sir.

Q. On the ball of the eye?

A. It seemed to be in the iris, the white part.
Q. It was inflammed in general?
A. Never made a thorough examination to find out.
Q. Just a little inflammation in his eye?
A. Yes, Judge.
Q. Find some pus? A. Yes, sir.
Q. Did the doctor say to wipe that out?
A. Said to bathe it.
Q. And you did? A. Yes, sir.
Q. How long were you attending upon him as a nurse. A. One week.
Q. You mean by that seven or eight days?
A. Seven days.
Q. Went on the second day after the accident and stayed seven days? A. Yes, sir.
(513)Q. Then you were with him eight days after the accident including the first day of the accident? A. Yes, sir; it would be eight days.
Q. Did Mr. Clark complain particularly any pain in his eye?
A. No, not in particular about the pain.
Q. He had a bad cold, hadn't he?
A. Don't know whether you would call, he had a cough a great deal.
Q. Had you in your experience seen persons have a serious inflammation of the eye?
A. Not a cold like that.
Q. What particular kind of a cold would have that effect on the eye? A. I don't know.
Q. You have seen people's eyes inflamed with a bad cold?
A. Yes, there are lots of reasons.
Q. Dirt might have caused the eye to be in that condition? A. It might.
Q. Did Mr. Clark during the time you were there complain of any loss of vision in that eye?
A. Not to me.
Q. Did he read any during your time as a nurse?
A. Yes, sir.
(514)Q. Read every night?
A. No, Judge; last couple of days I was there.
Q. Lying in bed reading?
A. Propped up in bed.
Q. Made no complaints at all of loss of vision in his eye to you? A. No, Judge.
Q. Did Dr. Dietrich attend him every day while you were there? A. With the exception of one.
Q. Dr. Smith there?
A. Dr. Smith attended during Dr. Dietrich's absence.
Q. One day? A. Yes, sir.
Q. How long did he read at a time during the latter part of your attendance as a nurse?
A. Probably 25 or 30 minutes.
Q. Read at different intervals during the day?
A. Not that I remember. About once a day.
Q. Use glasses? A. Yes, sir.
Q. What was his condition when you left him?
A. He was very much improved.
Q. Was he up?
A. Sat up on a chair one day for thirty minutes.
Q. As a matter of fact, he didn't have pneumonia?
A. Didn't have, he did have pneumonia.
(515)Q. A complete case of pneumonia?
A. Yes, Sir.

Q. Both lungs?

A. I don't know as both lungs were involved. I have forgotten, but I think there were.

Q. Entire lung or only a portion?

A. Entire, entire lungs were involved.

Q. Doctor treated him for that? A. Yes, sir.

Q. For his wounds? A. Yes, sir.

Q. And he was able to sit up the eighth day after he was in this accident, you say, about thirty minutes? A. Yes, sir.

Q. See him after that? A. Did I see him?

Q. I mean recently afterwards?

A. Yes, sir; I saw him in the course of a few weeks.

Q. Was he out then?

A. Had been up and down at intervals.

Q. Had been out of the house, do you know?

A. I don't know.

Q. Saw him in his house, did you. A. Yes, sir.

Q. How long were you there when you first saw him afterwards?

A. I don't remember what date I saw him. I know it (516) wasn't very long after I left there.

Q. He was up and around? A. I don't know.

Q. He appears to be up now, you see him standing up there by you, don't you. A. Yes, sir.

Q. Mrs. Clark was sick at the time, wasn't she?

A. Yes, Sir.

Q. Did you attend her as a nurse also?

A. I did.

Q. What was the condition of this eye when you left Mr. Clark as a nurse?

A. When I left him he was a little improved.

Q. Still some inflammation?

A. Yes, sir; I remember telling Mrs. Clark to continue the bathing after I left.

Q. You say the white part of the eye was a little bloodshot?

A. Well, I don't remember if it was bloodshot. At the time I did not pay very strict attention as the other injuries were so strictly severe.

RE-DIRECT EXAMINATION

Q. Was it the injuries he received in this wreck or collision that brought about the condition of pneumonia? A. Yes, sir.

(517)Q. He was internally conservatively injured by the accident? A. Yes, sir.

Q. What was the condition of Mr. Clark's right eye during the time you were nurse to him?

A. I presume it was all right.

Q. The right eye during the time you were nursing him appeared to be normal?

A. It appeared that way to me.

Q. You didn't observe that the right eye was inflammed nor in any way injured?

A. Not that I remember. I may have bathed both eyes when I was bathing the eye that was injured.

Q. Towards the last of your nursing did you observe anything wrong with the right eye?

A. No, Judge.

Q. What would cause pneumonia?

A. If there is a pressure over the lung.

Q. Is that the usual reason, the pressure over the lung? A. I don't know.

Q. Did you ever treat a case of pneumonia?

A. Yes, Sir.

Q. Well, now, his left was normal, wasn't it, except (518) this inflammation?

A. Well, as I stated before, I did not examine his eye, until the trouble came up and the doctor told me to bathe his eye.

Q. All you noticed about that eye was some inflammation? A. Yes, sir.

Q. On the front of the eye?

A. I have forgotten whether it was or what part. Only the eye was sore.

Q. And a little pus in it and you treated that eye under the direction of Dr. Dietrich? A. Yes, sir.

Q. No complaint from Mr. Clark, except that eye was sore. A. Yes, sir.

That the deposition of Dr. Dietrich comes clearly within the exception stated is recognized and approved in the following cases:

Holloway vs. Kansas City, 82 S. W. 89.
Fearnley vs. Fearnley, 98 Pac. 819.
Capron vs. Douglas, 85 N. E. 827.
Sanpere vs. Sanpair, 107 Pac. 369.
San Franc. Cred. House vs. MacDonald, 122 Pac. 964.
Studebaker vs. Faylor, 98 N. E. 318.
Glover vs. Patten, 165 U. S. 394.
Hunt vs. Blackburn, 128 U. S. 464.

We submit for the reasons stated, and on the authorities cited that the deposition of Dr. Dietrich is in defendant's bill of exceptions, and that the learned Appellate Court erred in its failure to consider the error based upon this assignment on the ground that the deposition was only in the record, and further erred in its Judgment affirming the Judgment of the Trial Court in its decision excluding said deposition on the ground that the testimony was privileged, and constitutes reversible error.

"Where it clearly appears from the record on a Writ of Error that evidence offered and excluded was competent, and that such evidence had materiality and weight, and that its exclusion might have caused injury to the party offering it, nothing further or more formal is required to show reversible error."

Owl Creek Coal Co. vs. Goleb, 210 Fed. 209-216.

ERROR NO. 8.

The learned Intermediate Court of Appeals in its Opinion and decision affirming the judgment of the Trial Court in excluding the testimony of Dr. Stark, the witness offered by defendant, on the ground that the several questions propounded and the answers thereto would violate the statutory rule protecting privileged communications between physician and patient.

The Court, in its Opinion, excerpts practically all the testimony of plaintiff on the subject of disqualification of the witness. No reference to the testimony of other witnesses who testified seems to have been considered by the Court, and if so, no prominence is given to their testimony by excerpts from the same or reference thereto in any manner whatsoever.

It would seem clear that the same rule applies to Dr. Stark as to Dr. Dietrich. Dr. Stark, in other words, as in Plaintiff's answer quoted in the opinion of the Court:

"It was understood Dr. Dietrich was to appoint an oculist to represent him in the examination of the eye of plaintiff. Left the whole thing to him (Dr. Dietrich), and when the appointment was made by Dr. Dietrich, I appeared."

This answer of plaintiff, and in fact the general tenor of his answers on this subject clearly show that Dr. Stark was the appointee and representative of Dr. Dietrich, acting in his stead; that what he (Dr. Dietrich) did and said through his appointee wsa what he did and said himself; that he (Dr. Dietrich) examined the eyes of plaintiff by and through his chosen representative. This conclusion is made clear by the answer of the plaintiff above quoted.

This conclusion follows legally and logically from the testimony of the plaintiff.

It further follows that these communications which

the Court below refused to permit the representative of Dr. Dietrich to testify to were admissible under the exception to the general rule stated under assignment in respect to Dr. Dietrich, the injury and treatment of the plaintiff's eye by Dr. Ditrich having been by the voluntary action of plaintiff made public by the testimony of Rebecca Manes, who testified to subjective and objective symptoms, diagnosis and treatment of his eye by Dr. Dietrich, the same physician who subsequently examined his eye through his appointed representative. The testimony given by the witness for plaintiff broke the seal of privacy and gave publicity to the whole matter.

He published the condition of his eye in open Court through his own witness, and he cannot be heard to assert that the confidence which the statute intended to remain inviolate should continue to exist.

In support of this error, the Court is referred to the cases cited under error No. 5, on the subject of excluding the deposition of Dr. Dietrich.

After the Court sustained objections to any testimony by Dr. Stark as to the condition of the plaintiff's eye, or any testimony by witness to show a different condition of the eye than that testified to by plaintiff, or tesify to facts from which inferences might be drawn contrary to the testimony of witnesses for plaintiff. Defendant then made its offer to prove by witness (Dr. Stark) "That at the time mentioned he examined the eye of plaintiff, and from his examination discovered a condition that indicated a blindness of plaintiff that existed a long time prior to the date of the alleged injury. That he found the optic nerve was atrophied and other physical conditions from which the conclusion that the cause of his blindness existed long anterior to his accident was inevitable." To this ruling of the Court, exceptions were duly made and allowed. Rec. p 476.

And the further avowal was made by defendant in respect to witnesses Drs. Smith and Goodrich that they would testify, if permitted so to do by the Court, that the condition of plaintiff's eye was as stated by Dr. Stark, and that, in their

opinion, the cause of blindness of plaintiff's eye existed a long time anterior to the accident. Rec. p 476.

And we further urge error in the ruling and judgment of the Courts below for the further reason: The evidence of Dr. Stark shows his opinion as an expert was based upon objective as well as subjective symptoms, the former not being within the gneral rule of privilege.

U. P. Ry. Co. vs. McMican, 194 Fed. 393-395.

The rule contended for by defendant in error in his motion to affirm under Rule VI in cases pending in this court on error or appeal, that this court performs the full measure of its duty by giving to the record such examination and consideration as may be necessary to enable it to determine whether plain error was committed by the court below in any of the particulars complained of, is sustained in the case of Chicago Junction Ry. Co. vs. King, 222 U. S. 222, the leading case on this subject, and by other cases cited in brief of defendant in error.

The rule contended for and the cases supporting the same are not contested.

That the case at bar does not come within the rule enunciated in the King case and others cited, is apparent, for the reason conditions of the instant case are not in any respect identical with those of the cases cited supporting the rule, but on the contrary, in the particular instances to which the attention of this honorable court is herein specially directed, is one, where the record not only shows plain error but prejudicial and injurious error of the courts below; by reason of which the motion to affirm should be denied, and on final hearing of this cause the judgments of the courts below should be reversed and the cause remanded.

Respectfully submitted,

William C. McFarland

Attorney for Plaintiff in Error.

John A. Garver 37

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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 347.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS P. CLARK,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES,

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THOMAS P. CLARK,
Defendant in error.

Supplemental Brief, for plaintiff in error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FIRST.

Jurisdictional facts.

This action was brought under the Federal Employers' Liability Act, to recover damages for personal injuries resulting from the alleged negligence of the Railway Company. It was commenced in the District Court of the Fifth Judicial District of the Territory of Arizona, by the filing of the complaint on January 18, 1912 (p. 13). The summons was served on the defendant on February 1, 1912 (p. 15).

The answer was duly filed in the same Court, on February 14, 1912 (p. 17). On the same day, Arizona became a State (p. 44); and, at that time, the action was pending in the terri-

torial court, the complaint and answer being then on file with the Clerk of that Court (p. 44).

The Enabling Act of June 20, 1910, under which Arizona was admitted as a State (36 Stat. L., 578), provided (Section 33), that actions then pending in the territorial courts should be transferred to and proceeded with in the proper Federal Court where, if they had been commenced in a State, the Federal court would have exclusive jurisdiction, and that they should be transferred to and proceed in the appropriate State court, where the cause of action was one of which the State and Federal courts have concurrent jurisdiction.

This Section was as follows :

> "SEC. 33. That the said circuit or the said district courts, as the case may be, shall have jurisdiction to hear and determine all trials, proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the supreme court of the said Territory at the date of its admission, as a State, the case being such that, under the laws of the United States touching the jurisdictions of federal courts, it might properly have been begun in or (as a separable controversy or otherwise) removed to said circuit or said district court had they been established when the litigation of such case or controversy was commenced. Should such case or controversy be such that, if begun within a State, it would have fallen within the exclusive original cognizance of a circuit or district court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said State of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts and not later than sixty days after the lodgment of the record of such case or controversy in the proper court of the State as herein provided. All cases and controversies pending at the admission of the State, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the State. All files,

records, and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district, and state courts, respectively, in such wise and so authenticated or proven as such courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause or proceeding pending in any court of the said Territory at the time of its admission as a State shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States or state court, as the case may be: *Provided, however*, That all cases pending and undisposed of in the supreme court of the said Territory at the time of the admission thereof as a State shall be transferred, together with the records thereof, to the highest appellate court of the State, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts: *Provided further*, That all cases so pending in said territorial supreme court in which the United States is a party, or which, if instituted within a State, would have fallen within the exclusive original cognizance of a circuit or district court of the United States shall, with the records appertaining thereto, be transferred to the circuit court of appeals for the ninth circuit, and be there heard and decided; and any such case which, if finally decided by the supreme court of the Territory, would have been in any manner reviewable by the Supreme Court of the United States may, in like manner and with like effect, be so reviewed after final decision thereof by said circuit court of appeals. Transfers of all files and records from the said territorial supreme court to the highest appellate court of the State and to the said circuit court of appeals shall be accomplished in such manner and under such proofs and authentications as the two last-mentioned courts shall respectively by rule prescribe.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said Territory as a State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said State and the said circuit or district courts of the United States sitting therein, and

> to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said State had been created and such circuit, district, and state courts had been established prior to the accrual of such causes of action and the commission of such offenses; and in effectuation of this provision such of the said criminal offenses as shall have been committed against the laws of the said Territory shall be tried and punished by the appropriate courts of the said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the circuit or district courts of the United States.
>
> All suits and actions brought by the United States in which said Territory is named as a party defendant which shall be pending in any court of said Territory at the date of its admission hereunder shall be transferred as herein provided, and the said State shall be substituted therein and become a party defendant thereto in lieu of said Territory."

The present action was one of which the Federal and State courts have concurrent jurisdiction; and this is conceded by the defendant in error (p. 45). It was, therefore, one which should have proceeded in the proper State court. The statute required the files and records in pending cases to be transferred to the Federal or State courts, respectively, "in such wise and so authenticated or proven as such courts shall respectively by rule direct"; and, upon such transfer, the actions were to be proceeded with in due course of law.

Section 33 also provided that where a case pending in the territorial court, such as this, of which the Federal and State courts ordinarily have concurrent jurisdiction, had been transferred to the proper State court, it might, within sixty days "after the lodgment of the record" in the State court, be removed into the Federal court, upon application to be made as nearly as possible in the manner provided for removal of cases from State to Federal courts.

The files and records in this case in the territorial Court were never transferred to the proper State Court nor to any State Court. The State Court to which they should have been transferred was, apparently, the Superior Court of Greenlee County, inasmuch as the new State Constitution contained the provision (Art. VI., Sec. 5), that there should be

a Superior Court in each County of the State, and the record shows that the plaintiff below was a citizen and resident of Greenlee County and that the Railway Company was domiciled at Clifton, in the same county (p. 37).

In the petition of the plaintiff, dated April 4, 1912 (p. 46), for the removal of the cause from the State to the Federal Court, the statement was made that the record in the case had been lodged in the Superior Court for Gila County on or about February 19, 1912 (p. 45). But this statement is clearly erroneous, as appears from other undisputed evidence in the case, supplied by the defendant in error. Upon the admission of Arizona as a State, the plaintiff below evidently supposed, in the first instance, that, under the Enabling Act, the action would proceed in the Federal Court and not in the State Court. This is apparent from the fact that the original complaint and answer, which were filed in the territorial court (pp. 13, 17), appear in the records of the Federal Court (pp. 1, 16), although they were never formally transmitted from the State to the Federal Court.

The amended complaint was served on April 1, 1912 (p. 31), and is entitled in the new United States District Court (p. 17); and it was filed in the office of the Clerk of that Court on April 4, 1912 (p. 31), the very day on which notice of the petition for removal to the Federal Court was served; while the Marshal's certificate of the service of the summons, on February 1, 1912, was also filed in the new Federal Court Clerk's office on March 23, 1912 (p. 16).

It was after all these papers had been filed in the Federal Court that the plaintiff apparently woke up to the fact that they were not properly there; and, on April 4, 1912, the plaintiff gave notice that, on a petition, a copy of which was served on the defendant, he would apply, on the 8th of April, to the Judge of the Superior Court of *Gila* County for an order removing the action into the Federal Court. It was in this petition that the erroneous statement above referred to was made, namely, that the papers had been lodged in the Superior Court of Gila County on February 19, 1912 (p. 45). No order of removal was made; and the plaintiff's attorney, in an affidavit, stated (p. 33) that the Judge of the Superior Court had declined to make an order of removal, on the ground that the records of the Territorial court had been transferred

(evidently to the Federal Court) and "never were lodged in nor became a part of the records of said Superior Court, and that he had no jurisdiction of said action, and thereupon *returned* all of the hereto annexed papers" (notice of application, proposed order and petition for removal).

In connection with the proposed removal of the case into the Federal Court, no bond was presented; and the proposed order of removal contains no recital of a bond (p. 34). The petition was not filed in the State Court, having been returned to the plaintiff, as stated above.

It is not pretended that the Clerk of the Superior Court of Gila County ever transmitted a certified or any other copy of the record to the Clerk of the Federal Court. He obviously had no record from which a copy could have been made.

SECOND.

The action should have proceeded in the Superior Court of Greenlee County.

As the action was one of which, if brought in a state court, the state and federal courts would have concurrent jurisdiction, it should have proceeded in the proper State court, in accordance with the provisions of Section 33 of the Enabling Act. There is nothing in the record to show that the Superior Court of Gila County was the proper State court. On the contrary, the record shows that the plaintiff was a citizen and resident of Greenlee County, and that the defendant was domiciled in that County (p. 37). The presumption is, therefore, that the action should have proceeded in the Superior Court of Greenlee County. The State Constitution provided that there should be a Superior Court in each County (Article VI., Sec. 5).

THIRD.

No jurisdiction in the State court.

Even if it should be assumed that the Superior Court of Gila County was the proper court, yet, as the files and records of the territorial Court were never transmitted to the Clerk of the Superior Court of Gila County, as required by Section 33 of the Enabling Act, that Court never acquired jurisdiction of the action. The action was, therefore, not pending in that Court at the time of the petition for its removal, and the application for the removal was, consequently, properly denied.

FOURTH.

Action not removable.

Even if it should be assumed that the action was properly pending in the Superior Court of Gila County at the time the petition to remove was made, yet the action was one which was not removable into the Federal court.

It was obviously the intention of Congress to provide for the removal of such actions from the State to the Federal court as might have been removed if the action had not been commenced at all until after the admission of the territory as a state. Section 33 of the Enabling Act is explicit on this point:

> "All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said Territory as a State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said State and the said circuit or district courts of the United States sitting therein, and to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said State had been created and such circuit, district, and state courts had been established prior to the accrual of such causes of action and the commission of such offenses."

If the present action had been commenced in the Superior Court of Gila County after Arizona became a State, and the petition and bond for removal had been filed, it could not have been removed into the Federal Court, owing to the express prohibition contained in the amendment of Section 6 to the Federal Employers' Liability Act, passed on April 5, 1910 (36 Stat. L., 291), just before the passage of the Enabling Act on June 20, 1910. This amendment was as follows:

> "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

This prohibition was re-enacted in the Judicial Code and constitutes the closing sentence of Section 28 (in force in April, 1912), and is as follows:

> "*Provided*, that no case arising under an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases', approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction, shall be removed to any court of the United States."

Thus, at the time of the application for the removal of the case at bar, no case in the State court arising under the Federal Employers' Liability Act could be removed to any Court of the United States. Where such an action is brought in the State court, the defendant has no power to remove it into the Federal Court, even though it arises under a Federal law and there is, in addition, diversity of citizenship.

> Lee v. Toledo, etc., Railway Co., 193 Fed., 685;
> McChesney v. Illinois Central R. R. Co., 197 Fed., 85.

There is no reason to believe that Congress intended that the right which it had just denied to the citizens of States should be extended to citizens of Territories when they became citizens of States.

FOURTH.

Requirements of removal statute not complied with.

Even if it should be assumed, for the sake of the argument, that the action was properly pending in the Superior Court of Gila County at the time the plaintiff applied for its removal, and that it was removable into the Federal court, yet the requirements of the statute were not complied with, and the Superior Court properly refused to make an order of removal.

Counsel for the respondent contends that an order of removal was not necessary and that the filing of the petition and bond in the State Court in itself effected a removal. That is undoubtedly so, where all the requirements of the statute are duly complied with.

Railroad Co. v. Mississippi, 102 U. S., 135, 141;
Railroad Co. v. Koontz, 104 U. S., 5, 14;
Steamship Co. v. Tugman, 106 U. S., 118, 122.

But it is not true where the statutory requirements have not been complied with.

Stone v. South Carolina, 117 U. S., 430, 432;
Crehore v. Ohio, etc., Ry. Co., 131 U. S., 240, 243.

The filing of a petition alone is insufficient to deprive the State court of jurisdiction. Section 29 of the Judicial Code expressly provides that the petition must be accompanied by a bond, with good and sufficient surety, for the entry, within thirty days, in the Federal court, of a certified copy of the record, and for the payment of all costs that may be awarded against the petitioner if the Federal courts should hold that the suit had been wrongfully removed. This was jurisdictional; but the record shows that no bond was filed.

Not only was no bond filed, but the petition itself was not filed in the State court. It was handed to the Judge of the State court at the time of the application for the removal; and, upon his refusal to order the removal of the cause, it was

returned to the plaintiff's attorney, who does not pretend to have filed it with the Clerk of the State court. There was, consequently, no record in the State court which could have been transmitted to the Federal court.

FIFTH.

The Federal court never acquired jurisdiction.

It follows from what has already been said, that the Federal court never acquired jurisdiction of the action.

A similar conclusion was reached by the Circuit Court of Appeals for the Eighth Circuit, where the question arose under the Enabling Act for the admission of New Mexico, passed at the same time as the Enabling Act for the admission of Arizona and in substantially the same language.

United States v. Alamogordo Lumber Co., 202 Fed., 700.

Even, however, if it should be further assumed, for the sake of the argument, that the action was removable and that the plaintiff did everything that was requisite to oust the State court of jurisdiction, yet still another step was requisite before the Federal court was vested with complete jurisdiction to proceed with the action, and that was to cause a *certified* copy of the record in the State court to be entered in the Federal court within thirty days from the filing of the petition for removal. The practice in this respect, prescribed by Section 29 of the Judicial Code (in force in April, 1912), was substantially the same as that which previously existed, except that the requirements were made slightly more strict by Section 29, in that the petition for removal was required to be "duly verified" and the copy of the record to be entered in the Federal court was required to be "certified." These requirements did not exist under the previous statute.

Not only was no certified copy of the record entered in the Federal court, in the present case, but there is absolutely no evidence that any copy of the record in the State court was ever entered in the Federal court. The United States District Court is a court of limited jurisdiction and can acquire juris-

diction only in the manner prescribed by statute; and it has no more power to proceed with an action commenced in the State court until a certified copy of the record has been duly lodged with it, than an appellate court has to review the decision of a lower court before the record in that court has been properly certified to it.

Blitz v. Brown, 7 Wall., 693;
Idaho, etc. Land Co. v. Bradbury, 132 U. S., 509, 512.

The failure to file the record within thirty days may be waived.

St. Paul, etc., Ry. Co. v. McLean, 108 U. S., 212, 216.

But it cannot be waived altogether, and the court cannot proceed with the action until the record has been filed.

Railroad Co. v. Koontz, 104 U. S., 5, 14.

SIXTH.

Question of jurisdiction not waived.

The mere fact that this question of jurisdiction was not raised in the lower Courts is of no consequence. It could not be waived. Parties are not permitted to litigate their issues in a court unless that court has been clothed with power to determine them. Jurisdiction cannot be conferred upon a court of limited jurisdiction by consent; and by joining issue in the Federal court and proceeding to trial there and afterwards reviewing the judgment in the Circuit Court of Appeals, the Railway Company was not precluded from raising the point for the first time in this Court.

Crehore v. Ohio, etc., Ry. Co., 131 U. S., 240, 243.

Indeed, if the plaintiff in error had not raised the point, the Court itself would have done so, on its own motion, if its attention had been called to it.

Mansfield, &c., Ry. Co. v. Swan, 111 U. S., 379;
Metcalf v. City of Watertown, 128 U. S., 586, 589;
Parker v. Ormsby, 141 U. S., 81, 83.

SEVENTH.

Error in exclusion of controlling evidence.

The brief submitted on behalf of the plaintiff in error, in opposition to the motion to confirm under Rule VI, discusses fully the errors of the trial court in ruling upon the admission of evidence; and it is unnecessary to consider these generally, in further detail. One of the rulings, however, was clearly of such vital importance as to justify calling the special attention of the Court to it.

The principal injury complained of was the destruction of the sight of the left eye; and the size of the verdict was undoubtedly due, in great measure, to this irreparable loss.

To show that the loss of the eye was not the result of the injury, the Railway Company took the deposition of Dr. Dietrich, who had attended the plaintiff. His evidence, however, as to the character of the plaintiff's injuries, was excluded, on the ground that he was incompetent to testify, owing to the fact that the knowledge was obtained by him in a professional capacity and that it was, therefore, privileged under the Arizona Statute; and the objection was sustained on that ground (pp. 449, 450). Further questions along the same line were objected to and excluded. Exceptions to the exclusion of the evidence were duly taken (pp. 453, 458). Similar objections were sustained by the Court in the examination of Dr. Stark, for the same reasons; and exceptions were taken (pp. 458, 476).

The Section of the Arizona statute relied upon, was as follows (R. S., 1901, Sec. 2535, subd. 6):

> "6. A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient: *Provided*, That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The privilege given by this Statute was clearly waived by the plaintiff in the present case.

I. The injuries sustained by the plaintiff, including the loss of the eye, were set forth in detail in the original complaint (pp. 5, 11, 12–13), in the first amended complaint (pp. 22, 28, 29, 31), in the second amended complaint (pp. 52, 53–4, 55, 57), and, again, in the petition for removal (p. 41). On the trial, the plaintiff testified personally in regard to his injuries; and, with reference to his eye, he said that "in two or three days it was gone entirely" (pp. 178, 180), and that it caused him great pain for more than a month (p. 181). The plaintiff also called as a witness Rebeckah Manes, a professional nurse, who had attended him for a week, commencing on the day after the accident (p. 509). She testified fully as to the plaintiff's condition and treatment and as to the instructions given by Dr. Dietrich for bathing the plaintiff's eye, which was somewhat inflamed (pp. 504, 509–10, 512–13). Incidentally, she directly contradicted the plaintiff's testimony as to the painful condition of the eye, and also his statement that he lost the sight of the eye within two or three days. Her testimony shows that the condition of the eye attracted but little attention; and, before she left, the plaintiff was sitting up in bed reading at least half an hour every day and apparently suffering no pain whatever in his eye or having any trouble with it, more than might be due to a slight cold or inflammation (p. 510).

Upon these facts, it was impossible for the plaintiff to claim that his physical injuries were known only to himself and to Dr. Dietrich, and that the latter was, therefore, precluded

from imparting any information in regard to it to other persons. The statute was intended to protect persons in the confidential disclosures that may be necessary in regard to their physical condition, in order to obtain intelligent treatment of diseases or physical defects which they would not otherwise disclose, if the relation between the physician and patient were not of the most confidential character. The statute was not intended to close the lips of physicians and thus lead to the deception of the courts, where the patient voluntarily publishes all the facts to the world.

In New York, the Code of Civil Procedure contains the following provision:

> "SEC. 834. A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information, which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity."

Section 836 applies this prohibition to the examination of a person as a witness, unless the provisions of Section 834 "are expressly waived upon the trial or examination by the * * * patient"; and, as to the waiver, the Section further provides, as follows:

> "The waivers herein provided for must be made in open court, on the trial of the action or proceeding; and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver. But the attorneys for the respective parties may, prior to the trial, stipulate for such waiver, and the same shall be sufficient thereof."

Notwithstanding these stringent provisions, the New York Court of Appeals has recently held, unanimously, that the privilege is waived under circumstances similar to those in the case at bar.

Capron v. Douglass, 193 N. Y., 11.

In that case, the plaintiff sued the defendant, a surgeon, for damages resulting from an alleged defective operation in

treating the plaintiff's broken leg. The facts were set forth in the complaint and testified to by the plaintiff on the trial (193 N. Y., 17). A subsequent operation was performed at the hospital by another surgeon, Dr. Glass, who was called by the defendant to testify, without objection. The defendant then called Dr. Douglass, who assisted Dr. Glass in the operation; but his testimony was excluded by the trial judge, upon objection under Section 834, above quoted.

This was held to be reversible error, because the plaintiff had waived his right by describing his injuries in the complaint, by testifying himself, and by permitting Dr. Glass to testify. On this point, the Court said (p. 15):

> "He has thus permitted the condition of his broken limb to be given to the public in open trial, thereby forever preventing it and its condition from being a secret between himself and his physician. The intent of the legislature in enacting the statute making such information privileged, was, doubtless, to inspire confidence between the patient and his physician, so that the former could fully disclose to the latter all the particulars of his ailment without fear that he might be exposed to civil or criminal prosecution, or shame and disgrace, by the disclosure thus made, and thus enable the latter to prescribe for and advise the former most advantageously."

What the Court in that case said generally, on the subject of waiver, is peculiarly, pertinent to the facts of the case at bar (p. 17):

> "The plaintiff, both in his complaint and in his testimony, has fully disclosed all of the details of his affliction as it existed both at his home and at the hospital. He has given in much detail how the fractures occurred, how they were treated, his pain and suffering, and so far as he was able to comprehend, when not under the influence of anaesthetics, the particulars of the operation at the hospital. He, himself, has, therefore, given to the public the full details of his case, thereby disclosing the secrets which the statute was designed to protect, thus removing it from the operation of the statute. In other words, he has waived in open court and upon the trial all information which he might have kept secret, by disclosing it himself. The charac-

ter of the action necessarily calls for a disclosure of his condition and the treatment that was adopted by the defendant and those assisting him. To hold that the plaintiff may waive the privilege as to himself and his own physicians and then invoke it as to the defendant and his physicians, would have the effect of converting the statute into both a sword and a shield. It would permit him to prosecute with the sword and then shield himself from the defense by the exclusion of the defendant's testimony. It would enable the plaintiff to testify to whatever he pleased with reference to his condition and the treatment adopted by the defendant without fear of contradiction. The plaintiff could thus establish his cause of action, and the defendant would be deprived of the power to interpose his defense by reason of the closing of the mouth of his witnesses by the provisions of the Code referred to. Such a construction of its provisions we think was never contemplated by the legislature. It would lead to unreasonable and unjust results. Instead thereof, a construction of the provisions of the Code, to the effect that when the privilege of the plaintiff has been once waived by him in court, either by his own testimony or by that of others given with his knowledge and consent, and his physical condition has been given to the public, the door is then thrown open for his opponent to give the facts as he understands them. This, to our minds, affords a more just and equitable rule and is the one that was evidently contemplated by the legislature."

In the present case, not only did the complaint, and the two amended complaints, and the petition for removal, set forth in detail the injuries sustained by the plaintiff, but the plaintiff himself testified to the injuries, and called his nurse to give her testimony in regard to them. The nurse thus took the place occupied by Dr. Glass in the New York case. In that respect, the facts are similar to those in Morris v. New York, etc., R. R. Co., (148 N. Y., 88), referred to with approval in Capron v. Douglass (*supra*), where the plaintiff had called one of two physicians who had attended him; and this was held to make the testimony of the other physician admissible.

The principle is similar to that which is recognized in the case of attorney and client, where, if the communication is

made in the presence of a third person, the privilege is waived.

Doheny v. Lacy, 168 N. Y., 213;
Thompson v. Cashman, 181 Mass., 36.

The decision in Capron v. Douglass (*supra*), is very much in point, and it is peculiarly persuasive, because the restrictions against the waiver of the privilege in New York are much more stringent than they are in Arizona.

II. Under subdivision 6, of Section 2535 of the Arizona Statutes (*supra*), it is expressly provided, that, if a person offers himself as a witness and voluntarily testifies to the facts communicated to the physician, he is deemed to consent to the testimony of the physician. That is what the plaintiff below did in the present case.

EIGHTH.

The judgments of the Courts below should be reversed, and the plaintiff in error should be left to take such action in the State court as he may be advised.

Washington, November 30, 1914.

JOHN A. GARVER,
Counsel for Plaintiff in Error.

FILED
JUL 30 1914
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 347

ARIZONA & NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS P. CLARK, Defendant in Error.

MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

WILLIAM M. SEABURY,
Attorney for Defendant in Error,
Fleming Building,
Phoenix, Arizona.

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Motion.

Comes now the defendant in error above named and moves this honorable court to affirm the judgment of the court below upon the ground that the recovery of a judgment by the plaintiff below under the Federal Employers' Liability Act is the sole excuse for the invocation of the appellate jurisdiction of this court, although no questions involving the construction or interpretation of such Federal statute and only general questions of a non-Federal character are presented for review, and no plain error or error at all was committed by the courts below in disposing of the cause, and that the questions on which the decision

of the cause depend are so frivolous as not to need further argument, and upon the further ground that it is manifest that the writ is prosecuted only for delay which is prejudicial to the rights of the defendant in error in consequence of which the defendant in error respectfully prays that damages may be awarded to the defendant in error as prescribed in Rule 23 of the Rules of this Court upon the affirmance of the judgment herein.

Respectfully submitted,
WILLIAM M. SEABURY,
Attorney for Defendant in Error,
Fleming Building,
Phoenix, Arizona.

Sir:

Please take notice that the foregoing motion will be submitted to the court at the City of Washington in the District of Columbia on the 11th day of October, 1914, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Yours truly,
WILLIAM M. SEABURY,
Attorney for Defendant in Error,
Fleming Building,
Phoenix, Arizona.

Dated this.....day of July, 1914.

To W. C. McFarland, Esq.,
Attorney for Plaintiff in Error,
Clifton, Arizona.

IN THE SUPREME COURT OF THE UNITED STATES.

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ARIZONA & NEW MEXICO RAILWAY COMPANY,
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MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

Statement.

This is a motion under Rule VI to affirm this cause.

The cause is here upon a writ of error directed to the United States Circuit Court of Appeals for the Ninth Circuit to review the affirmance of a judgment of the United States District Court of the District of Arizona.

The action was brought by Thomas P. Clark as the plaintiff in the trial court against the plaintiff in error here, under Section 2 of the Act of Congress, approved April 22, 1908, known as the Federal Employers' Liability Act, 35 Stat. at Large 65, Chapter 149, U. S. Comp. Stat. Supp. 1911, p. 1322, as amended April 5, 1910, 36 Stat. at Large, 291, Chapter 143, U. S. Comp. Stat. Supp. 1911, p. 1324, to recover damages for personal injuries received by him at the town of Clifton in the Territory of Arizona, while in the employ of the plaintiff in error, on or about March 15, 1911, and resulted in a judgment in favor of the plaintiff below upon a verdict in the sum of $12,675.00.

At the date the injuries were received and when the action was commenced, Arizona was a Territory and the suit was begun in the District Court of the Territory of Arizona, in the 5th Judicial District.

On February 14, 1912, the Territory of Arizona became a State, and thereafter, pursuant to the provisions of the Enabling Act, approved June 20, 1910, Section 33, the cause was removed or transferred to the United States District Court for the District of Arizona, and thereafter duly tried in that court.

Point I.

The writ herein was taken for delay only and the questions presented are frivolous.

The fact that this cause is brought under the Federal Employers' Liability Act as a statute of the United States is the sole excuse for the prosecution of this writ of error in this court.

But the record shows that there is no question of interpretation or construction of this Act in any way involved. Only non-federal questions are presented for review.

The questions presented are all general questions of pleading or evidence or practice common to all actions based on negligence, irrespective of any statute.

Each question is one upon which the decision of the Circuit Court of Appeals is final when the jurisdiction of the trial court depends entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, or when the cause arises under the patent laws, the copyright laws, the revenue laws or under the criminal laws, or involves the admiralty jurisdiction. (Judicial Code, Sec. 128.)

Each question is one of a class upon which Congress, when it passed the Judiciary Act of 1891, intended that the decision of the Circuit Court of Appeals should ordinarily be final.

Each question presented here has received full consideration in the Circuit Court of Appeals, and the chief question reviewed by the Circuit Court of Appeals involves a ruling of the trial court upon a question of evidence which was based upon a preliminary finding of fact made by the trial court, which in turn was duly affirmed by the Circuit Court of Appeals.

Such questions as are presented by this record should, therefore, be summarily treated and disposed of in this court.

In Chicago Junction Railway Company vs. King (222 U. S. 222-224), the cause of action was based on a statute of the United States—the Safety Appliance Law—and hence this court had jurisdiction to review on error a judgment of the Circuit Court of Appeals affirming a judgment of the Circuit Court.

But in affirming the judgment this court said:

> "* * * although we have jurisdiction to review because the cause of action, as stated in the pleadings, rests upon the Safety Appliance Law, the questions now presented in a broad sense are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals.
>
> "Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom, inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof.
>
> "We are of this opinion because, in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the court below in any of the particulars complained of."

Again in Texas and Pacific Railway vs. Howell, 224 U. S. 577, a judgment awarding damages for personal injuries rendered in a Circuit Court was affirmed in the Circuit Court of Appeals without opinion.

Error was prosecuted from this court solely upon the ground that plaintiff in error had a charter from the United States. Except for that fact the case would have stopped with the Circuit Court of Appeals.

"Under such circumstances," said the court, "we go no further than the inquiry whether plain error is made out," citing Chicago Junction Railway Company vs. King, supra, with approval.

The same rule was followed in Chicago, Rhode Island and Pacific Railway vs. Brown, 229 U. S. 317; and in Seaboard Air Line vs. Moore, 228 U. S. 433, the court applied the rule of the foregoing case, saying:

> "As, 'we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below,' the judgment of the Circuit Court of Appeals must be affirmed."

Citing Chicago Junction Railway Company vs. King, supra.

And still more recently in Grand Trunk W. Railway Company vs. Lindsay, 34 Supreme Court Reporter, 581, and in Southern Railway Company vs. Gadd, 34 Supreme Court Reporter 696, the court has again announced the same rule.

No plain error was committed by the court below. We direct the attention of the court to the opinion of the learned court below (207 Fed. 817), as a sufficient discussion of the merits here involved.

Since, therefore, it appears that no plain or other error is disclosed by the record, that the character of the case is such as not to require or to be entitled to receive from this court more than a summary inspection and examination of the record, and that such an examination and inspection, even if extended to the most searching scrutiny, would in-

evitably result in the affirmance of the judgment below, we respectfully submit that the judgment of the lower court should be affirmed. Should this motion be denied, we respectfully submit that since this cause is of such a character as not to justify extended argument it should be transferred for hearing to the summary docket. Since it clearly appears that the writ is prosecuted only for delay to the prejudice of the defendant in error, and is in reality frivolous, we respectfully submit that damages should be awarded to the defendant in error pursuant to Rule 23 of the Rules of this Court. (Southern Railway Company vs. Gadd, 34 Sup. Court Reporter, 696.)

Respectfully submitted,

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Office Supreme Court, U. S.
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No. 347.

In the

Supreme Court of the United States

October Term, 1914.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS P. CLARK,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

WILLIAM M. SEABURY,
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THE ARIZONA & NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS P. CLARK,
Defendant in Error.

No. 347.

BRIEF OF DEFENDANT IN ERROR.

This cause is here upon a writ of error directed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to review a judgment which affirms a judgment of the District Court of the United States for the District of Arizona entered upon a verdict of a jury in the sum of twelve thousand six hundred and seventy-five dollars ($12,675) in an action to recover damages for personal injuries received by the defendant in error as the result of the negligence of the plaintiff in error.

The action is based upon Section 2 of the Federal Employers' Liability Act (35 Stat. at Large 65, Chapter 149,

U. S. Compiled Statutes, Supplement 1911, page 1322, as amended April 5, 1910, 36 Statutes at Large 291, Chapter 143, U. S. Compiled Statutes, Supplement 1911, page 1324).

At the date the plaintiff below sustained the injuries complained of and when the action was commenced, Arizona was a territory and suit was begun in the District Court of the Territory of Arizona in the Fifth Judicial District.

On February 14, 1912, the territory of Arizona became a state, and thereafter, pursuant to the provisions of Section 33 of the Enabling Act (approved June 20, 1910), the cause was removed and transferred to the United States District Court of the District of Arizona, and duly tried in that court.

The record shows that the suit was originally brought on the federal and not the territorial side of the District Court of the Territory of Arizona in the Fifth Judicial District, and that it was there pending when Arizona became a state.

It also appears that the plaintiff below made every effort to secure a formal order from the Superior Court of the State of Arizona directing the removal of the cause from that court to the District Court of the United States for the District of Arizona, and that the application of the plaintiff below for this order of removal was made within the time prescribed by the provisions of the Enabling Act, to which reference has already been made.

This application was heard upon due notice to the plaintiff in error (R. 23), and it appears that the Superior Court of the State of Arizona, to which that application was made, was under the impression that no order of removal was necessary to effect a removal and transfer of the cause, and consequently declined to make such an order (R. 32).

Thereupon the grounds of the court's refusal to order a transfer of the cause were set out in the record (R. 32), and the records and files having been transferred to the District Court of the United States for the District of Arizona, the cause proceeded to trial and judgment.

Thereafter the plaintiff in error prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit without raising any contention whatever with reference to the alleged want of jurisdiction in the trial court to hear and determine the cause because of the failure of the plaintiff below to secure the entry of a formal order of removal (see Assignment of Errors, R. 628). Upon the motion of the defendant in error to place this cause upon the summary docket in order that there might be a speedy disposition thereof, the plaintiff in error for the first time raised this question of alleged want of jurisdiction.

The record presents twelve assignments of error in the decision of the Circuit Court of Appeals (R. 726-741).

An inspection of these assignments shows that all of the questions presented are of a non-federal character.

No question of interpretation or construction of the Federal Employers' Liability Act or other federal statute is involved or presented for review.

The defendant in error, therefore, claims:

Point I.

Inasmuch as no federal question is presented by this writ of error, and the only questions presented are those upon which Congress intended, when it passed the Judiciary Act of 1891, that the decision of the Circuit Court of Appeals should ordinarily be final, the Court will only examine the record for plain error and if no plain error is presented by the record, the judgment will be affirmed.

In support of this principle we respectfully direct the Court's attention to the following authorities:

Chicago Junction Ry. Co. v. *King*, 222 U. S. 222-224.
Texas & Pacific Ry. Co. v. *Howell*, 224 U. S. 577.
Seaboard Air Line v. *Moore*, 228 U. S. 433.
Chicago, Rock Island & Pacific Ry. Co. v. *Brown*, 229 U. S. 317.
Grand Trunk Western Ry. Co. v. *Lindsay*, 34 Sup. Ct. Rp. 581.
Southern Railway Co. v. *Gadd*, 34 Sup. Ct. Rp. 696.

Point II.

No plain or other error is disclosed by the record.

There is obviously no merit in the jurisdictional question presented here for the first time.

It is not even assigned as error in the assignments presented by this record.

The cause was instituted in the territorial courts pursuant to the rule announced in *El Paso & N. E. R. Co.* v. *Gutierrez*, 215 U. S. 94.

It was properly brought on the federal side of the territorial court. *Friday* v. *Santa Fe Ry. Co.*, 120 Pac. 316.

Section 1910 of the U. S. Revised Statutes, constituting seventy-eight of the organic laws of the territory of Arizona, declared:

> "Each of the District Courts in the territories mentioned in the preceding section (Section 1909, R. S. U. S., paragraph 72 *ante*) shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States. * * *"

The cause was one arising under the laws of the United States, namely, under the Federal Employers' Liability Act.

The plaintiff had exercised his privilege to have his controversy adjudicated in the national courts and not in the state courts, after admission to statehood, by filing his suit on the federal and not on the territorial side of the District Court of the Territory of Arizona.

Section 33 of the Enabling Act in part provides:

> "Should such case or controversy (pending in any of the territorial courts other than the Supreme Court of the territory at the date of its admission) be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a Circuit or District Court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said state of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those who under such general jurisdictional provisions fall within the concurrent but not the exclusive jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgment of the record of such case or controversy in the proper court of the state as herein provided. * * * All files, records and proceedings relating to any such pending cases or controversies shall be transferred to such Circuit, District and State Courts, respectively, in such wise and so authenticated or proven as such courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law. * * *"

We respectfully submit that it might well be claimed that the provisions of the Enabling Act relating to causes which if begun within a state would fall within the exclusive jurisdiction of the Federal Court would not prevent causes, which upon admission to statehood were already pending on the federal and not the territorial side of the courts of the territory, from devolving by succession rather than by the operation of the provisions of the Enabling Act upon the District Court of the United States for the District of Arizona. (See Section 64, Judicial Code.)

But however this may be, and assuming, as plaintiff contends, that the cause was one which if begun within the state would have been within the concurrent jurisdiction of the state and federal courts therein, it is clear that the District Court of the United States for the District of Arizona lawfully acquired and exercised jurisdiction of the case.

The Enabling Act does not require the actual signing of any order of removal.

Its requirement is that application for transfer shall be made

> "as nearly as may be in the manner now provided for removal of cases from state to federal courts,"

and not later than sixty days after the lodgment of the record in the proper court of the state.

It is, of course, elementary that it is the filing of the application and bond which operates as the removal of a case from a state to a federal court.

The making or the refusal to make an order by the state court has no effect whatever upon the jurisdiction of the federal court which in a removable cause vests *eo instanti*

upon the filing of the proper application and bond in the state court.

National Steamship Co. v. *Tugman*, 106 U. S. 58.
Railroad v. *Koontz*, 104 U. S. 5, 15.
Kern v. *Huidekoper*, 103 U. S. 485, 490.
Loop v. *Winter's Estate*, 115 Fed. 362.
Hubbard v. *Chicago, M. & St. P. Ry. Co.*, 176 Fed. 994, 998.
Mannington v. *Hocking Valley Ry. Co.*, 183 Fed. 133, 140.
Lund v. *Chicago, etc., Ry. Co.*, 78 Fed. 385.
Eisenmann v. *Delmar*, 87 Fed. 248, 250.
Burke v. *Bunker Hill M. Co.*, 46 Fed. 644.

There is nothing in *United States* v. *Alamogordo Lumber Co.*, 202 Fed. 700, which holds that an order is necessary or that its absence would in any way constitute a jurisdictional defect.

Here the plaintiff in error clearly waived the right to an order, if any such right existed, and if its absence in any way prejudiced the plaintiff in error, which clearly it did not, first, by going to trial without raising the point and then by invoking the jurisdiction of the Circuit Court of Appeals to review the judgment on its merits, which judgment the plaintiff in error now asserts is void for want of jurisdiction.

One may not invoke a court's jurisdiction and then complain that no jurisdiction exists.

We are confident that this Court will not nullify the trial of this cause and the proceedings in the Court of Appeals upon any such grounds.

Whatever rights the plaintiff in error had in the premises were in the nature of a privilege personal to it, which was

the subject of waiver and which was, in fact, waived by the conduct to which we have already adverted.

Louisville & N. R. Co. v. Parker, 155 Fed. 68, 69.
Kreigh v. *Westinghouse*, 214 U. S. 249.
In re Moore, 209 U. S. 490.
Davies v. *Lathrop*, 13 Fed. 565.

A consideration of the assignments of error shows that no plain or other error was committed in either of the courts below.

The assignments are as follows:

Assignment I.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the judgment of the court below."

This assignment is too general in terms to present any question for review.

Assignment II.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the trial court properly overruled and denied defendant's general demurrer to plaintiff's second amended complaint and to each and every count thereof."

The same question is presented by Assignment VI.

There is no merit in these assignments.

Under these assignments it is first argued that the complaint states a number of alleged breaches of duty by the defendant, but that no facts are alleged constituting negligence. It is next claimed that every ground of negligence complained of is open and obvious and that it appears from the face of

the complaint that the plaintiff below must necessarily have assumed the risks which resulted in his injuries.

An inspection of the complaint successfully refutes both of these contentions. (See particularly R. 52-54.) They are also refuted by the learned opinion of the Court of Appeals, 207 Fed. 817 (R. 708-716).

The complaint is supported by the following authorities:

The principle sought to be applied to this complaint is inapplicable to it. A plaintiff does not assume the risk of any danger which arises in whole or in part from the negligence of any officer, agent or employee of the defendant.

Wright v. *Yazoo R. Co.*, 197 Fed. 94, 97.
No. Pacific Ry. Co. v. *Maerkl*, 198 Fed. 6.
Sandidge v. *Atchison, Topeka & S. F. Ry. Co.*, 193 Fed. 878.
Choctaw, O. & G. R. Co. v. *McDade*, 191 U. S. 67.

Assignment III.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's special demurrer to the plaintiff's second complaint and each count thereof."

Assignment IV.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's motion to make plaintiff's second amended complaint more definite and certain."

Assignment V.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly overruled and denied defendant's motion to strike said amended complaint from the files on the ground of duplicity."

We regard these assignments, when addressed to this Court, as frivolous and deem a discussion of them wholly unnecessary.

Assignment VII.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly excluded the testimony of the witness J. T. Kelly offered by defendant to prove 'the general reputation of the plaintiff as a safe and conservative engineer. * * *' The evidence offered was clearly incompetent."

See opinion of court below.
See also *M., K. & T. Ry. Co.* v. *Johnson*, 48 So. Western 568.
Mansfield Coal & Coke Co. v. *McEnerny*, 91 Pac. State 185, 36 Am. Reports 662.
29 Cyc. 610, Notes 23 and 24.
29 Cyc. 619, Notes 67 and 68.
Thompson on Negligence, Volume 6, Sec. 7792.
Atlanta, etc., R. Co. v. *Smith*, 94 Ga. 107, 20 So. Eastern 763.
Towle v. *Pac. Improving Co.*, 33 Pac. 208.
21 Encyclopedia of Law, 2d Edition, 518, Note 6.

Assignment VIII.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly sustained the objections of the plaintiff to the testimony of Dr. H. H. Stark, a witness offered by defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received on the day of the alleged accident, and particularly as to the condition of the plaintiff in about two months subsequent to the date of the alleged injury."

The correctness of the decision of the trial court excluding this testimony depended upon the finding of a preliminary question of fact, namely, whether or not the plaintiff below was justified in assuming that the relation of physician and patient existed between him and Doctor Stark at or immediately prior to the time of his examination by that physician.

The trial court found that the surrounding circumstances were such as to justify the plaintiff in the belief that Doctor Stark was conducting the examination of the plaintiff as a consulting physician, and for that reason that the communications between the plaintiff and this physician were privileged.

The finding of this preliminary question of fact, as well as the ruling of the trial court, upon the admissibility of the evidence offered was affirmed by the Circuit Court of Appeals. See opinion of court below. It is also sustained by the following authorities:

Munz v. *Salt Lake City Ry. Co.*, 70 Pac. 852.
1 Elliott on Evidence, page 741, Sec. 634.
Underhill on Criminal Evidence, 2d Edition, Sec. 179.
The People v. *Ira Stout*, 3 Parker's Criminal Reports 670-675.
Reaffirmed in *People* v. *Austin*, 93 N. E. 59.
People v. *Murphy*, 4 N. E. 326.

Reinhan v. *Dennin*, 9 N. E. 320, 322.
Union Pac. R. Co. v. *Thomas*, 152 Fed. 365.
Freel v. *Market St. Cable Ry. Co.*, 97 Cal. 40.

Nor was the privilege waived by the examination of the nurse which attended the plaintiff.

This suggestion is made for the first time in the brief of counsel for plaintiff in error on the motion to affirm.

It is nowhere assigned as one of the grounds of error.

The examination of the nurse does not disclose any communication between the physician and the patient.

She simply testified in substance to the injuries from which the plaintiff was suffering and the treatment administered under the direction of the physician.

Assignment IX.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that it was precluded from considering the various assignments of error in respect to giving and refusing certain instructions for the reasons that the exceptions thereto were not seasonably taken."

Assignment X presents the same question.

These assignments relate to the instructions as given by the court and to those which the defendant requested the trial court to give to the jury. But the difficulty with the situation is that the record shows the fact that none of these exceptions were taken until long subsequent to the retirement of the jury.

In reality no exceptions to those instructions were taken at the trial, but were in fact presented twenty days after the judgment had been entered on the verdict of the jury. Thus

page 492 of the Record as part of the bill of exceptions discloses the following:

> "Saturday, November 16th, 1912.
>
> At nine o'clock a. m. this day, the plaintiff being present in person and represented by counsel and the defendant being present by its counsel, the jurors come into court and * * * and thereupon comes the further argument to the jury by counsel until its conclusion, when the court instructs the jury as to the law, the instructions being taken down by the reporter and transcribed in a separate transcript, and two bailiffs having been sworn to take charge of the jury, they retire from the court room in charge of their sworn bailiffs to consider of their verdict, and thereupon the following further proceedings are had herein, to-wit:
>
> The Court: Do either of you except to the statement of issues as made by the court?"

Then followed argument by counsel for the defendant in error, at the conclusion of which the court said:

> "The Court: I am not apprised as yet of any necessity of recalling the jury to modify the instructions. Now, what have you to say, Judge McFarland?"

The record shows (page 493) that counsel for the plaintiff in error then took certain exceptions to the charge as given and to the refusal of the court to charge as requested (R. 494). This occurred on October 16, 1912, when the verdict was rendered (R. 93-95).

But the record also shows that it was not until the bill of exceptions was presented for settlement, to-wit, on December 6, 1912 (R. 625), that the exceptions now relied upon were presented to the court.

Thus it appears that after the jury had retired to consider their verdict, then for the first time the question of presenting exceptions to the charge of the trial court arose (R. 492). The record also shows that the exceptions actually taken at the time of the trial, which, as we have already shown, were in reality taken after the jury had retired, were of so general a character as not to present for review any alleged error in the charge, even if the exceptions had been duly taken, which the record shows was not the case.

Am. Smelting & Refining Co. v. *Karapa*, 173 Fed. 608.
Pa. Co. v. *Whitney*, 169 Fed. 577.
Simpkins' Federal Suit at Law, page 114.

It is not surprising that the learned Circuit Court of Appeals declined to consider such exceptions. The court based its declination in this respect upon the authority of *Western Union Telegraph Co.* v. *Baker*, 85 Fed. 690, and the numerous cases therein cited.

Star Co. v. *Madden*, 188 Fed. 910.
Phelps v. *Mayer*, 15 Howard 161.
See also *Klaw* v. *Life Pub. Co.*, 145 Fed. 185.
Simpkins' Federal Suit at Law, page 113.

But the charge as given was not erroneous.

Substantial portions of it which are made the subject of criticism by the plaintiff in error were copied from *Richardson* v. *Klamath S. S. Co.*, 126 Pac. 26; *Westine* v. *Atchison, T. & S. F. Ry. Co.*, 144 Pac. 122; *Williams* v. *Bunker Hill & Sullivan Mining Co.*, 200 Fed. 211, 216.

Other portions of the charge (R. 608, 609) were copied from the court's charge in *No. Pac. Ry. Co.* v. *Maerkl*, 198 Fed. 1.

The charge on the subject of contributory negligence is proper.

No. Pac. Ry. Co. v. *Maerkl*, 198 Fed. 1.
Thornton on Federal Employers' Liability Act, 2d Ed., Sec. 86, page 140.

The jury were correctly instructed that the plaintiff must prove by a fair preponderance of the evidence that the defendant was guilty of negligence and that such negligence was the proximate cause of the plaintiff's injury. The plaintiff in error was not entitled to instructions more favorable to it than those given by the trial court.

If the plaintiff in error was guilty of any negligence producing the injuries complained of, the plaintiff was entitled to recover.

Grand Trunk W. Ry. Co. v. *Lindsay*, 201 Fed. 841.
Louisville & N. R. Co. v. *Wene*, 202 Fed. 887, 891.

The charge as a whole is supported by the following:

Wright v. *Yazoo R. Co.*, 197 Fed. 94, 97.
No. Pac. Ry. Co. v. *Maerkl*, 198 Fed. 6.
Sandidge v. *Atchison, T. & S. F. Ry. Co.*, 193 Fed. 878.
Choctaw, O. & G. R. Co. v. *McDade*, 191 U. S. 67.
Thornton on Federal Employers' Liability Act, 2d Ed., Sec. 86, pages 140, 143.

Assignment XI.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly instructed the jury on the subject of contributory negligence."

It is unnecessary to discuss this assignment inasmuch as it is covered by the authorities to which we have already alluded.

Assignment XII.

"The United States Circuit Court of Appeals for the Ninth Circuit erred in its opinion and judgment in holding and deciding that the court below properly included in its judgment interest on the amount found by the jury, to-wit, twelve thousand six hundred and seventy-five dollars ($12,675); that the same should draw interest at the rate of six per cent (6%) per annum from date until paid."

We think this assignment is sufficiently refuted by the opinion of the learned court below.

We think this record presents such slight excuse for the prosecution of this writ of error that it is clearly inferable that the writ was prosecuted solely for delay, and that from a federal point of view the questions presented are entirely frivolous and do not merit extensive consideration from this Court.

We submit that the case is in principle identical with the case of the *Southern Railroad Co.* v. *Gadd*, 234 U. S., and a proper one in which to impose the penalty prescribed by Rule 23 of the Rules of this Court.

The judgment of the Circuit Court of Appeals should be affirmed with costs and with the imposition of damages under and pursuant to Rule 23 of this Court.

Respectfully submitted,

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Phoenix, Arizona,
Attorney for Defendant in Error.

November 30, 1914.
Washington, D. C.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1914.

Office Supreme Court, U. S.
FILED
OCT 19 1914
JAMES D. MAHER
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No. 347

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS P. CLARK,
Defendant in Error.

Reply Brief of Defendant in Error in Support of Motion to Affirm

WILLIAM M. SEABURY,
Attorney for Defendant in Error,
Phoenix, Arizona.

The Arizona Republican Print

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REPLY BRIEF IN SUPPORT OF MOTION TO AFFIRM.

The motion is resisted upon the ground that the record has not been printed.

Yet the plaintiff in error refers to the pages of the printed record in its own argument. If when this motion is submitted the record is still unprinted in this Court we submit that the brief of the plaintiff in error supplies all the information necessary to enable the court to pass upon the motion.

The ground of the motion to affirm is that the right of review here depends upon the fact that the action was brought under the Federal Employers' Liability Act.

But the record shows that no Federal question is presented for review. Under such circumstances, it has been the practice of the Court to go no further than the inquiry whether plain error was committed below.

In support of the motion we rely upon:

Chicago Junction Ry. Co. vs. King 222 U. S. 222, 224.

Texas & Pacific Ry. Co. vs. Howell 224 U. S. 577.

Chicago Rhode Island etc. Ry. vs. Brown 229 U. S. 317.

Seaboard Air Line vs. Moore 228 U. S. 433.

Grand Trunk W. Ry. Co. vs. Lindsay 34 Sup. Ct. R. 581.

Southern Ry. Co. vs. Gadd 34 Sup. Ct. R. 696.

The discussion of the assignment of errors contained in the brief of the plaintiff in error submitted in opposition to this motion shows that no Federal question is presented for review. The argument of our learned opponent and the opinion of the learned Circuit Court of Appeals for the Ninth Circuit (207 Fed. 817) shows that no plain or other error was committed below.

In consequence of which we respectfully submit the motion to affirm should be granted.

This brings us to a consideration of the contention raised here for the first time that the trial court had no jurisdiction to try the cause under Section 33 of the provisions of the Enabling Act approved June 20, 1910.

The argument is that when Arizona became a state on February 14, 1912, this case was pending in the Territorial court and was one within the concurrent jurisdiction of the Superior Court of the State of Arizona and the District Court of the United States for the District of Arizona, and as such under Section 33 of the Enabling Act was removable to the Federal Court only by an order of removal; that no order of removal from the State Court to the Federal Court was ever signed, in consequence of which it is claimed that the proceedings in the trial court as well as those in the Circuit Court of Appeals, which resulted from the invocation of that Court's jurisdiction by the plaintiff in error, were coram non judice.

The contention is without merit.

The record shows that the suit was originally brought on the Federal and not Territorial side of the District Court of the Territory of Arizona in the fifth Judicial District (Record pp. 1-14, 32, 36-46) and that it was there pending when Arizona became a state.

Section 1910 of the United States Revised Statutes constituting Section 78 of the Organic Law of the Territory of Arizona declared

"Each of the District Courts in the territories mentioned in the preceding section (Section 1909 R.S.U.S. paragraph 72 ante) shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; * * * "

The cause was one arising under the laws of the United States, namely, under the Federal Employers' Liability Act.

The plaintiff had exercised his privilege by filing his suit on the Federal and not the Territorial side of the Court to have his controversy adjudicated in the National Courts and not in the State Courts after admission to statehood. Section 33 of the Enabling Act in part provided:

> "Should such case or controversy (pending in any of the Territorial Courts other than the Supreme Court of the Territory at the date of its admission) be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a Circuit or District Court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said State of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent but not the exclusive jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided

for removal of cases from State to Federal Courts, and not later than 60 days after the lodgment of the record of such case or controversy in the proper Court of the State as herein provided. * * * * All files, records and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district and State Courts, respectively, in such wise and so authenticated or proven as such Courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law; * * "

We respectfully submit that it might well be claimed that the provisions of the Enabling Act relating to causes which if begun within a State would fall within the exclusive jurisdiction of the Federal Court, would not prevent causes, which upon admission to statehood were already pending on the Federal and not the Territorial side of the Courts of the Territory, from devolving by succession rather than by the operation of the provisions of the Enabling Act upon the District Court of the United States for the District of Arizona.

But however this may be, and assuming that the cause was one which if begun within the state would have been within the concurrent jurisdiction of the State and Federal Courts therein, it is clear that the District Court of the United States for the District of Arizona lawfully acquired and exercised jurisdiction of the case.

The Enabling Act does not require the actual signing of any order of removal.

Its requirement is that application for transfer shall be made

> "as nearly as may be in the manner now provided for removal of cases from State to Federal Courts"

and not later than sixty days after the lodgment of the record in the proper court of the state.

It is, of course, elementary that it is the filing of the application and bond which operates as the removal of a case from a State to a Federal Court. The making of or the refusal to make an order by the State Court has no effect whatever upon the jurisdiction of the Federal Court which in a removable cause vests eo instanti upon the filing of the proper application and bond in the State Court.

National Steamship Co. vs. Tugman 106 U. S. 58

Railroad vs. Koontz 104 U. S. 5, 15

Kern vs. Huidekoper 103 U. S. 485, 490

Loop vs. Winter's Estate 115 Fed. 362

Hubbard vs. Chicago M. & St. P. Ry. Co. 176 Fed. 994, 998

Mannington vs. Hocking Valley Ry. Co. 183 Fed. 133, 140

Lund vs. Chicago etc. Ry. Co. 78 Fed. 385

Eisenmann vs. Delmar 87 Fed. 248, 250

Burke vs. Bunker Hill M. Co. 46 Fed. 644

Even supposing there were irregularities in the transfer yet the Federal Court's jurisdiction vested.

Bryant Bros. vs. Robinson 140 Fed. 321, 327

It appears of record that the plaintiff below made every effort he was required to make to secure the formal order of removal and transfer in this case.

It appears of record that within the time prescribed by law application to the Superior Court of the State was made to remove and transfer the case, which application was made on due notice to the plaintiff in error here.

It appears that the Superior Court was of the impression that no order was necessary to effect a removal and transfer of the cause and consequently declined to make such an order.

Thereupon the grounds of the court's refusal affirmatively to order a transfer of the cause were set out in the record and the records and files having been transferred to the District Court of the United States for the District of Arizona the cause proceeded to trial and judgment therein. (See affidavit of L. Kearney in Record.)

There is nothing in United States vs. Alamogordo Lumber Co. 202 Fed. 700, which holds that an order is necessary or that its absence would in any way constitute a jurisdictional defect. The repeated expressions of the Court are that on prompt obection an order should be made.

But here the plaintiff in error clearly waived the right to an order, if any such right existed, and if its absence in any way prejudiced the plaintiff in error, which clearly it did not, first, by going to trial without raising the point and then by invoking the jurisdiction of the Circuit Court of Appeals to review the judgment on its merits, which judgment the plaintiff in error now asserts is void for want of jurisdiction.

One may not invoke a Court's jurisdiction and then complain that no jurisdiction exists.

We are confident that this Court will not nullify the trial of this cause and the proceedings in the Court of Appeals upon any such grounds. Whatever rights the plaintiff in error had in the premises were in the nature of a privilege personal to it, which was the subject of waiver and which was, in fact, waived by the conduct to which we have already adverted.

Louisville & N. R. Co. vs. Fisher 155 Fed. 68, 69.

Kreigh vs. Westinghouse 214 U. S. 249.
In re Moore 209 U. S. 490
Davies vs. Lathrop 13 Fed. 565

We respectfully submit that the judgment of the Court below should be affirmed.

Respectfully submitted,

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Attorney for Plaintiff in Error,
Fleming Building, Phoenix, Ariz.

Dated this 12th day of October, 1914,
Washington, D. C.

court after statehood without interposing any objection to the jurisdiction of that court, *held*, to amount to a waiver of the objection (based upon § 33 of the Arizona Enabling Act) that upon the commencement of statehood the action should have been transferred to the proper state court, subject to removal to the Federal court upon application made in due form for that purpose.

Under Rev. Stat. Arizona, § 2535, subd. 6, providing that a physician or surgeon cannot be examined without consent of his patient as to any communication made by the patient with reference to a disease or as to any knowledge obtained by personal examination of such patient unless such patient has offered himself as a witness and voluntarily testified in regard to such communications, evidence of physicians respecting the results of a personal examination of plaintiff was in this case properly excluded because plaintiff had not testified with reference to communications made by him to the physician, although he had voluntarily testified with respect to his injuries and had introduced other evidence respecting them.

207 Fed. Rep. 817, affirmed.

THE facts, which involve the construction of certain provisions of the Federal Employers' Liability Acts of 1908 and 1910 and of the Arizona Enabling Act and of a statute of Arizona relating to the admission of evidence of physicians of the plaintiff in actions for personal injuries, are stated in the opinion.

Mr. John A. Garver, with whom *Mr. William C. McFarland* was on the brief, for plaintiff in error:

The action was not removable. See § 33, Arizona Enabling Act, and express prohibition in amendment of § 6 of the Employers' Liability Act of April 5, 1910, as reënacted, § 28, Jud. Code; *Lee* v. *Toledo &c. Ry.*, 193 Fed. Rep. 685; *McChesney* v. *Ill. Cent. R. R.*, 197 Fed. Rep. 85.

Even if the action were removable, the requirements of the removal statute were not complied with. This case does not fall under *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Steamship*

Co. v. *Tugman*, 106 U. S. 118, but under *Stone* v. *South Carolina*, 117 U. S. 430; *Crehore* v. *Ohio &c. Ry.*, 131 U. S. 240.

The Federal court never acquired jurisdiction. *United States* v. *Alamogordo Lumber Co.*, 202 Fed. Rep. 700.

No certified copy of the record was entered in the Federal court, and there is no evidence that any copy of the record in the state court was ever entered in the Federal court. *Blitz* v. *Brown*, 7 Wall. 693; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509.

While the failure to file the record within thirty days may be waived, *St. Paul &c. Ry.* v. *McLean*, 108 U. S. 212, it cannot be waived altogether, and the court cannot proceed with the action until the record has been filed. *Railroad Co.* v. *Koontz*, 104 U. S. 5.

The question of jurisdiction was not waived and the railway company was not precluded from raising the point for the first time in this court. *Crehore* v. *Ohio &c. Ry.*, 131 U. S. 240.

If the plaintiff in error had not raised the point, the court itself would have done so, on its own motion, if its attention had been called to it. *Mansfield &c. Ry.* v. *Swan*, 111 U. S. 379; *Metcalf* v. *Watertown*, 128 U. S. 586; *Parker* v. *Ormsby*, 141 U. S. 81.

It was error to exclude the deposition of plaintiff's attending physician under Rev. Stat. Arizona, 1901, § 2535, subd. 6, on the ground that his knowledge was privileged because obtained in a professional capacity. The privilege, if any, was waived. It was so held under a similar statute in New York. *Capron* v. *Douglass*, 193 N. Y. 11.

The principle is similar to that which is recognized in the case of attorney and client, where, if the communication is made in the presence of a third person, the privilege is waived. *Doheny* v. *Lacy*, 168 N. Y. 213; *Thompson* v. *Cashman*, 181 Massachusetts, 36.

ARIZONA & NEW MEXICO RAILWAY COMPANY *v.* CLARK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 347. Argued December 1, 1914.—Decided January 11, 1915.

Where an action under the Employers' Liability Act of 1908 was pending in an inferior territorial court of Arizona prior to statehood, such action being one of which the Federal and state courts have concurrent jurisdiction, the voluntary appearance of defendant in the Federal

Under the Arizona statute it is expressly provided, that, if a person offers himself as a witness and voluntarily testifies to the facts communicated to the physician, he is deemed to consent to the testimony of the physician. That is what the plaintiff below did in the present case. See also *Holloway* v. *Kansas City*, 82 S. W. Rep. 89; *Fearnley* v. *Fearnley*, 98 Pac. Rep. 819; *Capron* v. *Douglas*, 85 N. E. Rep. 827; *Sanpere* v. *Sanpair*, 107 Pac. Rep. 369; *San Fran. Cred. House* v. *MacDonald*, 122 Pac. Rep. 964; *Studebaker* v. *Faylor*, 98 N. E. Rep. 318; *Glover* v. *Patten*, 165 U. S. 394; *Hunt* v. *Blackburn*, 128 U. S. 464; *Un. Pac. Ry.* v. *McMican*, 194 Fed. Rep. 393.

Mr. William M. Seabury for defendant in error, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action, brought by Clark against the Railway Company, was commenced in January, 1912, in the District Court of the Fifth Judicial District of the then Territory of Arizona. It was based upon the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291. The complaint alleged that while defendant was engaging in commerce between the Territories of Arizona and New Mexico as a common carrier by railroad, and while plaintiff was employed by defendant in such commerce, he sustained certain personal injuries through the negligence of defendant and its employés, for which he claimed damages in the amount of $40,000. After the action was commenced, and on February 14, 1912, the Territory of Arizona became a State, and the further proceedings (improperly, it is said), were conducted in the District Court of the United States for the District of Arizona. In that court plaintiff filed a first and a second amended complaint, and defendant, having unavailingly moved to strike the latter from the files, upon grounds not necessary to be specified, answered upon

the merits, without interposing any objection to the jurisdiction of the court. A trial by jury was had, resulting in a verdict and judgment for plaintiff, and this was removed by defendant's writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment was affirmed (207 Fed. Rep. 817). The present writ of error was then sued out.

Two matters only require particular discussion. The Enabling Act of June 20, 1910, under which Arizona was admitted as a State (c. 310, § 33, 36 Stat. 557, 577), provided in effect that actions which, at the date of admission were pending in the territorial courts (other than the Supreme Court) should be transferred to and proceed in the proper Federal court in cases where, if they had been begun within a State, the Federal court would have had exclusive original jurisdiction, and that where the cause of action was one of which the state and Federal courts would have concurrent jurisdiction, the action should be transferred to and proceed in the appropriate state court, but in this case might be transferred to the Federal court upon application of any party, to be made as nearly as might be in the manner provided for removal of causes from state to Federal courts.

The present action being one of which the Federal and state courts have concurrent jurisdiction, it is insisted that upon the commencement of statehood it should have been transferred to the proper state court, subject to removal to the Federal court upon application made in due form for that purpose; that in fact the files and records in the territorial court were never transferred to the proper state court, or to any state court; and that a certain petition of plaintiff, which appears in the record, wherein he prayed for the removal of the cause from the state to the Federal court, was insufficient and inefficacious for the purpose, for want of compliance with certain of the requirements of the removal statute. It is further insisted

that in the Enabling Act it was the intention of Congress to provide for the removal of actions from the state to the Federal courts only in case they might have been removed if the action had not been commenced until after the admission of the Territory as a State; and that under the express prohibition contained in the amendment of § 6 of the Employers' Liability Act, passed April 5, 1910, c. 143, 36 Stat. 291, shortly before the passage of the Enabling Act, and which declares that "no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States," (reënacted as § 28, Judicial Code), actions of this character were not removable under the general provisions of § 33 of the Enabling Act.

We need spend no time upon these questions, since there is no ground for denying the jurisdiction of the District Court of the United States over the subject-matter, the objections urged are of such a nature that they might be waived, and the record shows that they were waived by the action of defendant in permitting the cause to proceed in the Federal court, and answering there upon the merits, without objection based upon the grounds now urged or any jurisdictional grounds. The action being one arising under a law of the United States, and the requisite amount being in controversy, the Federal District Court had original jurisdiction under § 24, Judicial Code. The removal proceedings were in the nature of process to bring the parties before that court, and the voluntary appearance of the parties there was equivalent to a waiver of any formal defects in such proceedings. *Mackay* v. *Uinta Development Co.*, 229 U. S. 173, 176. The case of *United States* v. *Alamogordo Lumber Co.*, 202 Fed. Rep. 700, cited by plaintiff in error, is clearly distinguishable, for timely objection was there made.

The second matter requiring mention is the alleged error of the trial court in excluding the evidence of two

physicians called by defendant for the purpose of testifying to the results of a personal examination of plaintiff shortly after he received the injuries for which damages were claimed. The trial court based the rulings upon an Arizona statute (R. S. 1901, § 2535, subdivision 6), which reads as follows:

"6. A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient: *Provided*, That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney (*sic*)."

A material part of the injury complained of was the loss of the sight of plaintiff's left eye, and because this was set forth in the pleadings, and upon the trial plaintiff testified personally in regard to his injuries, mentioning the loss of sight and pain in the eye, and called as a witness a nurse who attended him after the accident, and who testified as to the condition of the eye, it is insisted that plaintiff in effect consented to the examination of the physicians with respect to his condition. The argument is that the statute was intended to protect persons in the confidential disclosures that may be necessary in regard to their physical condition, but was not intended to close the lips of physicians where the patient voluntarily publishes the facts to the world. In support of this, plaintiff in error cites two cases from the New York Court of Appeals, *Morris* v. *New York &c. Ry.*, 148 N. Y. 88, and *Capron* v. *Douglass*, 193 N. Y. 11. But the New York statute [1] is materially different from that of Arizona.

[1] Extracts from the New York Code of Civil Procedure.

"Sec. 834. A person duly authorized to practice physic or surgery, . . . shall not be allowed to disclose any information which

The purpose of the latter enactment is very clearly expressed in its language. Without the consent of the patient, the physician's testimony is excluded with respect to two subjects: (a), any communication made by the patient with reference to any physical or supposed physical disease, and (b), any knowledge obtained by personal examination of such patient. And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies "with reference to such communications." We would have to ignore the plain meaning of the words in order to hold, as we are asked to do, that the testimony of other witnesses offered by the patient, or the testimony of the patient himself with reference to other matters than communications to the physician, or any averments contained in the pleadings but not in the testimony, amount to a waiver of the privilege. The enactment contemplates that the physician receives in confidence what his patient tells him and also what the physician learns by a personal examination of the patient. It contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent

The express object is to exclude the physician's testimony, at the patient's option, respecting knowledge

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he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity. . . ."

* * * * * * * *

"SEC. 836. The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the . . . patient. . . . The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. . . ."

gained at the bedside, in view of the very delicate and confidential nature of the relation between the parties. The statute recognizes that they do not stand on equal terms. The patient is more or less suffering from pain or weakness, distracted by it, ignorant of the nature or extent of his injury or illness, driven by necessity to call in a professional adviser, sometimes with little freedom of choice; he relies, perforce, upon the physician's discretion, as well as upon his skill and experience, and is obliged by the circumstances of his own condition not only to make an explanation of his ailment or injury, so far as it may be within his knowledge and may be communicable by word of mouth, but also to submit to the more intimate disclosure involved in a physical examination of his person. The physician, on the other hand, is in the full possession of his faculties, and of that knowledge which is power. Manifestly, the patient occupies, for the time, a dependent position. The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences. The question of dealing justly as between the patient and third parties is a secondary consideration.

It is a mistake, we think, to regard the patient's disclosures—whether verbal or physical—as voluntary in the full sense; they are believed by him to be necessary for the restoration of health or the preservation of life or limb. But, at least, if he has command of his mind and memory, the patient may somewhat control the extent of his disclosures by word of mouth, and may be able afterwards to testify respecting them; while, if he submits himself to a physical examination at the hands of the physician, he cannot know in advance the nature or extent of what the physician will learn, cannot confine the disclosure to the present ailment or injury, and cannot afterwards testify respecting its results, excepting as the physician may in-

form him of them. And, in many cases, the physician may, with perfectly proper motives, withhold from the patient the results of the physical examination and his deductions therefrom.

We cannot, therefore, without encroaching upon the domain of legislation, declare that there is no substantial ground for a distinction between the information the physician gains from verbal communications made by the patient and the far wider knowledge that he derives from his personal examination of the patient. Certainly it cannot be said that when the patient afterwards has occasion to make averments and adduce evidence respecting the nature of the ailment or injury, he thereby necessarily publishes to the world the facts as disclosed to the physician through the physical examination. In many cases this must be very far from true; the patient having no access to the facts as thus disclosed excepting with the consent of the physician. The language of the statute, as we think, shows a recognition of this, and also of the fact that when the patient himself has occasion to testify respecting his ailment or disease, he often must do so without knowing the range or the character of the testimony that might be given by the physician, and without any means of contradicting it. In order to prevent the patient from being subjected to this disadvantage, the Act gives him the option of excluding the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment.

The framer of the Act was careful to choose language that recognizes the distinction between (a) communications made by the patient and (b) knowledge obtained by the doctor through a personal examination of the patient. The New York statute, which, so far as we have observed, was the first to establish a privilege with respect

to the knowledge gained by a physician while attending a patient in a professional capacity, recognizes no such distinction. Nor does it define with precision what conduct on the part of the patient shall constitute a waiver of the privilege. Hence the courts of that State deemed themselves at liberty to determine this question upon general principles, derived from the supposed policy of the law. Not only, therefore, are the decisions of the courts of that State, and of other States having statutes formed upon the same model, valueless as guides to the meaning of the statute here in question, but the very fact that the Legislature of Arizona departed from the form of the New York statute indicates that it did so because it had a different purpose to express. We are unable to see anything that would justify us in refusing judicial recognition to a distinction thus laid hold of by the lawmaking body in defining the extent and conditions of the privilege.

To construe the Act in accordance with the contention of plaintiff in error would not only be a departure from its language, but would render it inapplicable in all cases where the "physical or supposed physical disease" is the subject of judicial inquiry, and where any averment respecting it is made in pleading or evidence upon the subject is introduced at the trial in behalf of the patient. This would deprive the privilege of the greater part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where the patient might have no occasion to raise an issue or introduce evidence on the subject, or where the patient's disease might happen to be under investigation in a controversy between other parties. We are constrained to reject this construction.

The other questions that are raised require no special mention. It is sufficient to say that we find no error warranting a reversal of the judgment.

Judgment affirmed.

MR. JUSTICE HUGHES, with whom MR. JUSTICE DAY concurred, dissenting.

I am unable to agree to the approval of the ruling which excluded the physicians' testimony. It should be supposed that it was the legislative intent to protect the patient in preserving secrecy with respect to his ailments and not to give him a monopoly of testimony as to his condition while under treatment. Here, not only did the plaintiff introduce the evidence of his nurse, describing in detail his bodily injuries and the medical treatment, but the plaintiff offered himself as a witness and voluntarily testified as to his bodily condition. His testimony covered the time during which he was under the physician's examination, and it was upon this testimony that he sought to have the extent of his injuries determined by the jury and damages awarded accordingly. To permit him, while thus disclosing his physical disorders, to claim a privilege in order to protect himself from contradiction by his physician as to the same matter, would be, as it seems to me, so inconsistent with the proper administration of justice that we are not at liberty to find a warrant for this procedure in the statute unless its language prohibits any other construction. [See *Hunt* v. *Blackburn*, 128 U. S. 464, 470; *Epstein* v. *Railroad*, 250 Missouri, 1, 25; *Roeser* v. *Pease*, 37 Oklahoma, 222, 227; *Forrest* v. *Portland Ry. L. & P. Co.*, 64 Oregon, 240; *Capron* v. *Douglass*, 193 N. Y. 11; 4 Wigmore on Evidence, § 2389 (2).]

As I read the Arizona statute it was framed not to accomplish, but to prevent, such a result. We have not been referred to any construction of it by either the territorial or state court, and we must construe it for ourselves. To my mind, its meaning is that if the patient voluntarily testifies as to his physical condition at the time of the examination, he cannot shut out his physician's testimony as to the same subject. To reach the contrary

conclusion, emphasis is placed on the words 'such communications' in the proviso, and it is insisted that the proviso was to apply only if the plaintiff testifies as to what he *told* the physician. I think that this is altogether too narrow. When the patient submits himself to an examination, he as truly communicates his condition to the physician as if he tells him in words. Although the patient were dumb, his submission to inspection in order that he might be treated would be none the less a communication of what is thus made known. That is the very ground of the privilege. Nor does the fact that the statute, with unnecessary diffuseness, refers in the sentence defining the privilege to 'any communication' or 'any knowledge obtained by personal examination' limit the natural meaning of the proviso. In saying that 'if a person offer himself as a witness and voluntarily testify with reference to such communications,' it is to be deemed 'a consent' to the physician's testifying, the proviso may be, and I think should be, taken to embrace implied as well as express communications. I can find no reasonable basis for a distinction. It is said that the plaintiff may not know what the physician has observed or what testimony he may give. But when the plaintiff testifies he invites analysis and contradiction, and in contemplation of law he asks to have his statement judged by what is shown to be the truth of the matter. If the plaintiff testifies as to what he told the physician, it is conceded that the physician may be examined, and the obvious reason is that the plaintiff is not to be permitted to insist upon his privilege as to what he himself is disclosing. This is the policy of the statute—and it governs equally, as I read it, when the plaintiff testifies as to his physical condition at the time he submits himself to the physician's examination. The words 'such communications' are broad enough to cover all communications for the purpose of treatment, whether by utterance or by what is usually more revealing—the

yielding of one's body to the scrutiny of the practitioner. To repeat, it seems to me that the statute was intended to make it impossible for the plaintiff to claim the privilege when he himself has testified as to the subject of it.

As in this view competent, and presumably important, evidence was excluded, I think that the judgment should be reversed.

I am authorized to say that MR. JUSTICE DAY concurs in this dissent.